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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 11, 1903.

(18,889.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 13, 1903.

1 To the circuit court of the United States for the southern district of New York:

The petition of Whitaker Wright respectfully shows:

First. Your petitioner is a citizen of the United States and is imprisoned and restrained of his liberty in the county jail of the county of New York in the city and State of New York, in the custody of William Henkel, marshal of the United States for the southern district of New York, by virtue of a warrant dated March 16th, 1903, issued by Thomas Alexander "United States commissioner for the southern district of New York and commissioner duly authorized by the district court of the United States for the southern district of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," a copy of which warrant is hereto annexed and marked "A."

Second. Your petitioner further shows that said warrant was issued by the aforesaid United States commissioner upon a complaint purporting to have been made by Percy Sanderson, His Britannic Majesty's consul general at the port of New York, a copy of which complaint is hereto annexed and marked "B."

Third. That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for the detention of your petitioner; that it does not state any facts

2 which show that your petitioner has been guilty of any offence within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland.

Fourth. That your petitioner has duly objected to the continuance of any proceedings under the said complaint and warrant before the said United States commissioner on the ground that the said commissioner has no authority or jurisdiction to proceed therewith on the grounds aforesaid, or under any provisions of the Constitution or laws of the United States, or any treaty of the United States with any foreign country; that said objections have been overruled by the said commissioner and he has adjourned the said proceedings until the 30th day of March, 1903.

Fifth. Your petitioner further alleges that on the 18th day of March, 1903, he presented to the aforesaid United States commissioner an application to be admitted to bail pending the aforesaid proceeding, and in support of said application he filed with said commissioner the affidavit of his attending physician of which a copy is hereto annexed marked "C," which is in all respects true. That the said United States commissioner denied said application on the ground that no power existed for admitting your petitioner to bail, in spite of the fact that an application made by the representative of His Britannic Majesty's consul general at the port of New York for an adjournment of said proceedings until the 30th

day of March, 1903, had been granted, and that it had been
3 stated by said representative that further adjournments would in all likelihood be thereafter applied for.

Sixth. That the cause or pretence of the imprisonment and restraint of your petitioner is that a charge has been made against him as set forth in the aforesaid complaint and warrant, and the decision of the aforesaid commissioner that he has no power to admit your petitioner to bail on the charge which has been made against him as aforesaid.

Seventh. Your petitioner is informed by counsel, and verily believes, his imprisonment and detention as aforesaid is illegal; that the aforesaid warrant is wholly void; that the aforesaid complaint states no jurisdictional facts to warrant his imprisonment and detention; that the denial to him of the right to give bail constitutes a violation of the eighth amendment of the Constitution of the United States and section 1015 of the United States Revised Statutes, and of the common law of the United States of America, and constitutes a deprivation of your petitioner's liberty without due process of law.

Wherefore, your petitioner prays that writs of *habeas corpus* and certiorari issue directed to the persons having your petitioner in custody, commanding him to produce the body of your petitioner before this court forthwith, and that he return all proceedings against your petitioner to this court for such action thereon as may be proper in the premises.

Dated New York, March 19th, 1903.

WHITAKER WRIGHT, *Petitioner.*

4 GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for Petitioner.

Office & post office address, 30 Broad St., borough of Manhattan, New York city.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, } *ss:*

Whitaker Wright, being duly sworn, deposes and says, that he has read the foregoing petition and knows the contents thereof, and that the same is in all respects true.

WHITAKER WRIGHT.

Subscribed and sworn to before me this 19th day of March, 1903.

SIMEON G. MANHEIM,
[SEAL.] *Notary Public* 218, *New York County.*

5 "A."

The President of the United States to any marshal of the United States, to the deputies of any marshal or any or either of them:

Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12th, 1889, before me Thomas Alexander one of the commissioners appointed by the district court of the United States for the southern district of New York, and also commissioner especially appointed to execute the acts of Congress, entitled "An act for giving effect to certain treaty stipulations, between this and foreign governments for the apprehension and delivery of certain offenders" approved August 12th, 1848, and of the several acts amendatory thereof, that one Whitaker Wright, did heretofore during the month of October, in the year 1899 and in the months of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland, called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore in the month of October in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corpora-
6 tion, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain.

Now therefore, we command you forthwith to take the said Whitaker Wright, and bring him before me, the said commissioner, at my office, room 60, in the Post Office building in the city of New York, in order that the evidence of the criminality of the said Whitaker Wright, may be heard and considered, and if deemed sufficient to sustain the charge that the same may be certified, together with a copy of all the proceedings, to the Secretary of State, that a warrant may issue for his surrender pursuant to the said treaty.

Witness my hand and official seal the 16th day of March, 1903.

(Signed) THOS. ALEXANDER,

U. S. Commissioner for the Southern District of New York and Commissioner Duly Authorized by the District Court of the United States for the Southern District of New York, and also Commissioner Appointed under the Laws of the United States Concerning the Extradition of Fugitives from the Justice of a Foreign Government under a Treaty or Convention Between This and Any Foreign Government.

7 "B."

Before Thomas Alexander, Esq., U. S. Commissioner, &c.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Percy Sanderson, His Britannic Majesty's consul general at the port of New York, being duly sworn, doth depose and say, upon information and belief:

First. That one Whitaker Wright did heretofore, in the month of October in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation which were false: the said Whitaker Wright then well knowing the said reports and statements to be false,
8 with intent thereby to deceive and defraud the shareholders or members of the said corporation.

Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain.

Fourth. That deponent's information and belief are based upon messages received by cable from His Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offence herein charged, and directing deponent to apply for a provisional warrant under the treaty for extradition between the United States and Great Britain.

That deponent has since the apprehension of the said Whitaker Wright yesterday cabled to His Majesty's said foreign secretary for fuller details as to said crime and an answer is directly expected, but that the said Whitaker Wright may be detained, pending the arrival of such information, deponent asks for a provisional warrant herein.

(Signed) PERCY SANDERSON.

Subscribed and sworn to before me this 16th day of March, in the year 1903.

[SEAL.] (Signed) THOS. ALEXANDER,
U. S. Commissioner for the Southern District of New York and Commissioner Duly Authorized by the District Court of the United States for the Southern District of New York, and also a Commissioner Duly Appointed under the Laws of the United States Concerning the Extradition of Fugitives from the Justice of a Foreign Government under the Treaty or Convention Between This and Any Foreign Government.

9 "C."

Before Thomas Alexander, Esq., U. S. Commissioner, etc.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss.:*

Wilhelm Levin, being duly sworn, deposes and says:

I am a physician and surgeon residing at No. 49 East Seventh street, in the city of New York. I am acquainted with the above named Whitaker Wright. I was called to attend him on March 17th, 1903, at about five o'clock in the afternoon by the warden of the New York county jail, where the said defendant is detained.

I examined Mr. Wright and found that he was suffering from an acute attack of bronchitis. He was also suffering from a severe chill. I examined his surroundings, and I state it to be my professional opinion that unless Mr. Wright is forthwith placed under more favorable conditions, his present ailment may develope into pneumonia. He is of such physique, that the confinement from which he is now suffering, will tend greatly to injure his health and to result in serious impairment. The illness from which he is now suffering is greatly aggravated by his imprisonment, and I
10 believe that injury may result to him if such imprisonment continues.

WILHELM LEVIN, M. D.

Sworn to before me this 18th day of March, 1903.

GEO. F. BEHRINGER,
Notary Public, Rockland Co.

Certif. filed in N. Y. Co.

11 (Endorsed:) U. S. circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker Wright under the treaty between the United States and Great Britain.—Petition for writ of *habeas corpus* and of certiorari.—Guggenheimer, Untermyer & Marshall, attorneys for petitioner, No. 30 Broad street, city of New York.—Read on application March 20, 1903. E. H. Lacombe, U. S. C. J.—U. S. circuit court, southern district of New York, Filed Mar. 20, 1903, John A. Shields, clerk.

12 The President of the United States to William Henkel, marshal of the United States for the southern district of New York, Greeting:

We command you that you have the body of Whitaker Wright, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Whitaker Wright may be called or charged, before a term of the circuit court of the United States for the southern district of New York to be held in the Post Office building in the city, county and State of New York, on the 23rd day of March, 1903, at 1.30 o'clock in the afternoon of that day, to do and receive what shall then and there be considered concerning said Whitaker Wright, and have you then and there this writ; and that at the same time you return all proceedings taken against the said Whitaker Wright.

Witness, Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of March, one thousand, nine hundred and three.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for Petitioner.

Office and post office address, 30 Broad street, borough of Manhattan, New York city.

(Endorsed:) U. S. circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker
13 Wright, under the treaty between the United States and Great Britain.—Writ of *habeas corpus* and of certiorari.—Let the within writ issue. Dated N. Y. March 20, 1903. E. Henry Lacombe, U. S. C. J.—Southern district of New York. In compliance with the within writ of *habeas corpus*, I now produce the body of the said Whitaker Wright, before the circuit court of the United States for the southern district of New York. Dated New York, March 23rd, 1903, at 1.30 p. m. William Henkel, United States marshal, southern district of New York.—Remanded until decision of motions argued to-day. March 23, 1903. E. Henry Lacombe, U. S. C. J.

14 In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

To the district court of the United States for the southern district of New York:

I, Thomas Alexander, United States commissioner for the southern district of New York, and duly appointed and authorized to act as a commissioner under title 66 of the United States Revised Statutes, in obedience to the foregoing writ of certiorari, do hereby certify

that the papers hereto annexed and returned herewith, contain the records of the proceedings had before me in the above-entitled matter.

Dated New York, March 21, 1903.

THOS. ALEXANDER,

[SEAL.] *U. S. Commissioner, Southern District of New York.*

15 The President of the United States to Thomas Alexander, U. S. commissioner for the southern district of New York and commissioner duly authorized by the district court of the United States for the southern district of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," Greeting:

We command you that you return before a stated term of the circuit court of the United States for the southern district of New York to be held in the Post Office building in the city, county and State of New York, on the 23rd day of March, 1903, at 1.30 o'clock in the afternoon of that day, all proceedings had and taken before you against Whitaker Wright under and pursuant to a warrant issued by you on the 16th day of March, 1903, upon a complaint purporting to have been made by Percy Sanderson, His Britannic Majesty's consul general at the port of New York; and also all proceedings taken before you in said matter upon an application by the said Whitaker Wright to be admitted to bail pending the aforesaid proceeding: and to do and receive what shall then and there be considered concerning the said matters, and have you then and there this writ.

Witness, Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of March, one thousand nine hundred and three.

JOHN A. SHIELDS, *Clerk.*

GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for Petitioner.

Office & post office address, 30 Broad street, borough of Manhattan, New York city.

16 (Endorsed:) United States circuit court, southern district of New York.—In the matter of the application for the extradition of Whitaker Wright under the treaty between the United States and Great Britain.—Writ of certiorari.—Let the within writ issue. Dated N. Y., March 20th, 1903. E. H. Lacombe, U. S. C. J.

17 Before Thomas Alexander, Esq., U. S. Commissioner, &c.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Percy Sanderson, His Britannic Majesty's consul general at the port of New York, being duly sworn, doth depose and say, upon information and belief:—

First. That one Whitaker Wright, did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland, called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

18 Second. That the said Whitaker Wright, is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty, is an offence within the treaty between the United States and Great Britain.

Fourth. That deponent's information and belief are based upon messages received by cable from His Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offence herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

That deponent has since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for uller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be detained, pending the arrival of such information, deponent asks for a provisional warrant herein.

PERCY SANDERSON.

Subscribed and sworn to before me this 16th day of March, in the year 1903.

[SEAL.] THOS. ALEXANDER,
U. S. Commissioner for the Southern District of New York and Commissioner Duly Authorized by the District Court of the United States for the Southern District of New York, and also a Commissioner Appointed under the Laws of the United States Concerning the Extradition of Fugitives from the Justice of a Foreign Government under a Treaty or Convention Between This and Any Foreign Government.

(Endorsed:) Before Thomas Alexander, Esq., U. S. commis-
19 sioner. In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and Great Britain.—Complaint.—Charles Fox, att'y for H. B. M. C. G. 3 Broad St. New York.

20 Before Thomas Alexander, Esq., U. S. Commissioner, etc.

In the Matter of the Application for the Extradition of J. WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

Wilhelm Levin, being duly sworn, deposes and says: I am a physician and surgeon residing at No. 49 East Seventh street, in the city of New York. I am acquainted with the above named J. Whitaker Wright. I was called to attend him on March 17th, 1903, at about five o'clock in the afternoon by the warden of the New York county jail, where the said defendant is detained.

I examined Mr. Wright and found that he was suffering from an acute attack of bronchitis. He was also suffering from a severe chill. I examined his surroundings, and I state it to be my professional opinion that unless Mr. Wright is forthwith placed under more favorable conditions, his present ailment may develope into pneumonia. He is of such physique, that the confinement from which he is now suffering, will tend greatly to injure his health and to result in serious impairment. The illness from which he is now suffering is greatly aggravated by his imprisonment, and I
21 believe that injury may result to him if such imprisonment continues.

WILHELM LEVIN, M. D.

Sworn to before me this 18th day of March, 1903.

GEO. F. BEHINGER,
Notary Public, Rockland Co.

Certif. filed in N. Y. Co.

(Endorsed :) Before Thomas Alexander, Esq., U. S. commissioner, etc.—In the matter of the application for the extradition of J. Whitaker Wright, under the treaty between the United States and Great Britain.—Affidavit of Dr. Levin.—Guggenheimer, Untermyer & Marshall, attorneys for defendant, No. 30 Broad St. New York city.

22 In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

Before United States Commissioner Thomas Alexander, in the United States Court and Post Office Building, in the City of New York, March 16, 1903.

Present: The prisoner. Charles Fox, Esq., for demanding government. Messrs. Guggenheimer, Untermyer & Marshall for the prisoner.

The prisoner arraigned. Examination demanded and set for March 18, 1903, at 3 p. m.

MARCH 18, 1903.

The prisoner not present.

Present: Charles Fox, Esq., for demanding government. Messrs. Guggenheimer, Untermyer & Marshall for the prisoner.

Mr. Marshall moved that the complaint herein be dismissed.

Motion denied.

Mr. Marshall moved that the prisoner be released from custody on bail pending the hearing herein, and submitted the affidavit of Dr. Wilhelm Levin thereon.

Motion argued and submitted.

The commissioner directed counsel to appear before him
23 on March 19, 1903, at 3 p. m. when he would announce his decision upon the motion. Further hearing adjourned to March 30, 1903, at 2 p. m.

ON MARCH 19TH, 1903.

Present: Mr. Fox for the demanding government. Counsel for the prisoner.

The commissioner announced as his decision upon the motion to release upon bail, that he was compelled to deny the same for want of power.

(Endorsed :) U. S. district court, southern district of New York.—In the matter of the application for the extradition of Whitaker Wright a fugitive from England.—Return to certiorari.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1903, John A. Shields, clerk.

24 MONDAY, *March* 23, 1903.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT.

The writs of *habeas corpus* and certiorari in the above entitled matter coming on for argument, Mr. Louis Marshall is heard in support of the writ and certiorari.

Charles Fox, Esq., appeared in opposition thereto.

C. A. V.

25 United States Circuit Court, Southern District of New York.

In the Matter of Extradition of WHITAKER WRIGHT.

Habeas Corpus to Test Sufficiency of Complaint and to Enlarge on Bail.

LACOMBE, *Circuit Judge:*

It may reasonably be assumed that when the phrase "made criminal by the laws of both countries" was inserted in the treaty of 1889 it was perfectly well understood that under our system of government there are certain spheres within which the Federal Government exercises domain, and other spheres in which it cannot intrude, the individual States alone being competent therein. Within its own sphere the Federal Government may make certain acts criminal; without that sphere it is powerless to make equally heinous acts criminal, but it recognizes the power of the State to do so. It seems too narrow a construction of the act to hold that in adding the above-quoted clause to the enumeration: "Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company," the United States was assenting to the proposition that the enumeration must be restricted to the sphere within which the Federal Government was competent to regulate the subject by general laws. If certain

26 fraudulent acts, by a trustee of real estate for instance, were made criminal, in identical language, by the laws of every State in the Union the treaty, if thus interpreted, would not apply, so long as there was no Federal statute which covered the case; although Congress under the Constitution might not be competent to enact such a statute. When by the law of England and by the law of the State in which the fugitive is found the fraudulent acts which it is charged he has committed are made criminal he is fairly within the treaty: a statute of the State is, broadly speaking, "a law of this country" as contradistinguished from a "law of Great Britain."

The complaint, in somewhat inartificial language, charges that the petitioner, being then a director of a specified finance corporation, did make, circulate and publish certain reports and statements of ac-

counts of the said corporation, which were false, and which he knew to be false,—with the intent thereby to deceive and defraud. This charge is within the sections cited (83 & 84) from chap. 96 XXIV and XXV Victoria, and also within section 611 of the Penal Code of New York, subdivision 3. The application to discharge from custody is, therefore, denied without prejudice to its renewal when the evidential papers arrive, and the precise acts complained of are more specifically set forth.

The application to admit to bail is denied briefly for the following reasons.

1. The only case found in our reports, which deals with
27 the subject of bail in international extradition proceedings is adverse to petitioner. *In re* Carrier 57 F. R. 578.

2. Applications to admit to bail in such cases have on several occasions (although not recently) been made to the circuit court in this district, and have been uniformly denied, although no opinions appear to have been written.

3. It is not difficult to conceive of some sufficient reason why the United States, having assumed certain treaty obligations, should provide a scheme for carrying them out which should not provide for enlargement on bail; and we find that, whereas the statutes regulating the arrest of persons in one Federal district who may be charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision.

4. The opinion of Lord Russell in Queen *v.* Spillsbury, 2 Q. B. D. (1898) 615, upon which petitioner principally relies and which holds that "the Court of Queen's Bench has, independently of statute, by the common law, jurisdiction to admit to bail" is not persuasive. The opinion concludes with the statement: "This inherent power to admit to bail is historical, and has long been exercised by this court, and if the legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment." The circuit courts of the United States, however, have no such historical heritage. "These courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred
28 upon them." Bath County *v.* Amy, 13 Wall., 244.

The writ is dismissed.

(Endorsed:) Circuit court of the United States for the southern district of New York.—In the matter of extradition of Whitaker Wright.—Opinion, Lacombe, C. J.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1903, John A. Shields, clerk.

29 United States Circuit Court, Southern District of New York.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

SIRS: Please take notice that the annexed proposed order will be presented to the Honorable E. Henry Lacombe, circuit judge, at his chambers in the U. S. court and P. O. building, in the city of New York, on Monday, March 30th inst., at 11 a. m. for settlement.

Dated New York, March 28, 1903.

Yours &c.,

CHARLES FOX,
Att'y for H. B. M. Consul General,
No. 3 Broad Street, New York.

To Guggenheimer, Untermyer & Marshall, Esqs., attorneys for Whitaker Wright.

30 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Monday, the thirtieth day of March in the year of our Lord one thousand nine hundred and three.

Present: The Honorable E. Henry Lacombe, circuit judge.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

The above matter having coming on to be heard upon the petition for and the returns to writs of *habeas corpus* and *certiorari* and after hearing counsel for the respective parties, and upon motion of Mr. Charles Fox, of counsel for the complainant in this proceeding,

It is ordered that the said writs of *habeas corpus* and certiorari be and each of them is dismissed and the application for release of the accused on bail denied on the ground that there is no power or jurisdiction in this court to admit him to bail and prisoner is remanded to the custody of the United States marshal for the southern district of New York.

E. HENRY LACOMBE,
U. S. Circuit Judge.

31 (Endorsed:) United States circuit court, southern district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and Great Britain.—Order.—Charles Fox, att'y for H. B. M. C. G., 3 Broad street, New York.—Service of a copy of the within order admitted this 28th day of March, 1903. Guggenheimer, Untermyer & Marshall, att'ys for petitioner.—U. S. circuit court, southern district of New York, Filed Mar. 30, 1903, John A. Shields, clerk.

32 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

I, E. Henry Lacombe, one of the judges of the United States circuit court for the second judicial circuit do hereby certify that upon the hearing of the above cause the construction and application of the treaties between the United States of America and the United Kingdom of Great Britain and Ireland with regard to extradition was fairly raised by the petition herein for writs of *habeas corpus* and certiorari and was argued on the hearing of the same, and was determined by the court; and I further certify that upon said hearing the power and jurisdiction of the United States circuit court under the said treaties and under the United States Revised Statutes and the Constitution of the United States of America, to admit the petitioner to bail pending an examination into his alleged criminality, was fairly raised by the petition for writs of *habeas corpus* and certiorari and was argued upon the hearing of the same and was determined by the court.

Dated New York, April 7th, 1903.

E. HENRY LACOMBE, *U. S. C. J.*

33 (Endorsed:) United States circuit court, southern district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and Great Britain.—Certificate.—Louis Marshall, attorney for petitioner, 30 Broad street, New York city.—U. S. circuit court, southern district of New York, Filed Apr. 7, 1903, John A. Shields, clerk.

34 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

To the Supreme Court of the United States:

The petition of Whitaker Wright respectfully shows:

First. That your petitioner is unlawfully imprisoned and illegally restrained of his liberty in the jail in the city, county and State of New York commonly known as Ludlow Street jail and is in custody in violation of the treaty between the United States of America and the Kingdom of Great Britain ratified in 1842, and the treaty supplemental thereto ratified by the respective governments in 1889, William Henkel, marshal of the United States for the southern district of New York, claiming or pretending to so restrain your petitioner by virtue or authority of a certain warrant of commitment to him

alleged to have been issued by one Thomas Alexander, United States commissioner for the southern district of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government, which charges your petitioner with the
35 commission of the crime of fraud as a director of a company, alleged to have been committed by your petitioner in the city of London, United Kingdom of Great Britain and Ireland.

Second. That your petitioner was arrested by the said William Henkel, United States marshal for the southern district of New York, upon the aforesaid warrant, which warrant was issued upon the complaint of His Britannic Majesty's consul general at the port of New York, Sir Percy Sanderson.

Third. That your petitioner was arraigned before the aforesaid Thomas Alexander, United States commissioner, upon the aforesaid charge, and thereupon moved for a dismissal of the complaint and for his discharge, and objected to the continuance of any proceedings under the said complaint and warrant before the said United States commissioner on the ground that the said commissioner had no authority or jurisdiction to proceed therewith because said complaint stated no facts which created jurisdiction for the issuance of the aforesaid warrant and for the detention of your petitioner, and that it did not state any facts which showed that your petitioner had been guilty of any offence within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland, and that the said commissioner had no authority or jurisdiction to proceed under the aforesaid complaint and warrant, or under any provision of the Constitution or laws of the United States, or of any treaty of the
36 United States with any foreign country. Said objections were thereupon overruled by the said commissioner.

Fourth. Your petitioner further alleges that he thereupon presented to the aforesaid United States commissioner an application to be admitted to bail pending the aforesaid proceedings, and the said United States commissioner denied the said application on the ground that no power or jurisdiction existed for admitting your petitioner to bail.

Fifth. Thereupon, on the application of the counsel for the representative of His Britannic Majesty, further proceedings before the said United States commissioner were postponed until April 8th, 1903, to await the arrival of depositions from England and your petitioner is informed that further applications to delay the hearing before the said commissioner as to his alleged criminality will be made on behalf of the prosecution.

Sixth. Thereafter, upon a petition setting forth the facts hereinbefore related, dated the 19th day of March, 1903, your petitioner sued out writs of *habeas corpus* and certiorari in the circuit court of the United States in and for the southern district of New York, said writ of *habeas corpus* commanding the said William Henkel, United States marshal for the southern district of New York, to

have the body of your petitioner, together with the time and cause of your petitioner's imprisonment and detention, and the said writ of certiorari commanding Thomas Alexander, United States commissioner, to certify the entire record of the proceedings had before him; and both of the aforesaid writs were made returnable
37 before the circuit court of the United States at a stated term thereof which was held on the 23rd day of March, 1903.

Seventh. Your petitioner was duly brought before the said circuit court of the United States by the said William Henkel, United States marshal for the southern district of New York, at the time mentioned in the said writ, and he made the return as required by the terms of the said writ, and the aforesaid Thomas Alexander, United States commissioner, made his return to the aforesaid writ of certiorari to the said court as required by the terms thereof.

Eighth. After hearing arguments of counsel decision was reserved by the court, and thereafter, on the 30th day of March, 1903, an order was entered dismissing the said writs of *habeas corpus* and certiorari and remanding your petitioner to the custody of the said William Henkel, United States marshal for the southern district of New York; and the application for the release of your petitioner on bail, which was also then and there argued, was denied on the ground that there was no power or jurisdiction in the United States circuit court to admit him to bail.

Wherefore, your petitioner, feeling himself aggrieved by said order, appeals therefrom to the Supreme Court of the United States and prays that this appeal may be allowed and that the transcript of the said order and of all of the proceedings in the United States circuit court in and for the southern district of New York, and of the return of the said William Henkel, United States marshal, to the said writ of *habeas corpus* and the return of the said Thomas Alex-
38 ander, United States commissioner, to the said writ of certiorari, may be transmitted to the Supreme Court of the United States for review.

Dated New York, April 1st, 1903.

WHITAKER WRIGHT, *Petitioner.*

LOUIS MARSHALL,
Attorney for Petitioner, 30 Broad Street, New York City.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Whitaker Wright, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WHITAKER WRIGHT.

Subscribed and sworn to before me this sixth day of April, 1903.

HYMAN ROSENSCHEIN,
Notary Public, N. Y. Co.

[SEAL.]

(Endorsed:) United States circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and
39 Great Britain.—Petition for appeal.—Louis Marshall, attorney for petitioner, 30 Broad street, New York city.—The within appeal is hereby allowed. April 7, 1903, E. Henry Lacombe, U. S. C. J.—Service of a copy of the within petition for appeal is hereby admitted. Dated New York, Ap'l 7, 1903, Chas. Fox, attorney for H. B. M. C. G.—U. S. circuit court, southern district of New York, Filed Apr. 8, 1903, John A. Shields, clerk.

40 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

And now comes the petitioner, Whitaker Wright, by Louis Marshall, his counsel, in connection with his petition of appeal from the order entered herein on the 30th day of March, 1903, dismissing the writs of *habeas corpus* and certiorari herein, and makes and files the following assignments of error:

The court erred:

First. In dismissing the writs of *habeas corpus* and certiorari and remanding the petitioner.

Second. In holding that the petitioner is lawfully held in custody.

Third. In holding that the crime charged against the petitioner is one which is extraditable within the provisions of article I, subdivision 4, of the extradition treaty of 1889 between the United States of America and the United Kingdom of Great Britain and Ireland.

Fourth. In holding that the crime charged against the petitioner is one which is made criminal by the laws of both the United States of America and the United Kingdom of Great Britain and Ireland.

41 Fifth. In holding that the crime charged against the petitioner, to wit, the commission of fraud by a director of a company, is made criminal by the general laws of the United States as distinguished from the local legislation of some of the particular States of the Union.

Sixth. In holding that it is sufficient to make fraud by a director extraditable if by the law of the State of New York, where the petitioner was arrested, such act is made criminal, irrespective of the question as to whether or not it is made criminal by the general law of the United States.

Seventh. In holding that by subdivision 3 of section 611 of the Penal Code of the State of New York there was prescribed a crime which is the equivalent of the crime charged in the complaint and

warrant on which the petitioner was arrested to have been committed by him in England.

Eighth. In holding that the crimes described in XXIV and XXV Victoria, chapter 96, section 84, and in subdivision 3 of section 611 of the Penal Code of New York, were the equivalent of each other.

Ninth. In holding that no power or jurisdiction exists to admit your petitioner to bail pending the examination into his alleged criminality.

Tenth. In holding that the United States circuit court has no inherent power to admit the petitioner to bail during the pendency of the extradition proceedings against him.

Eleventh. In holding that the provisions of the extradition
42 treaty between the United States of America and the United Kingdom of Great Britain and Ireland, or the acts of Congress regulating such proceedings, contain any prohibition against the admission of the petitioner to bail pending said proceedings.

Twelfth. In holding that section 1015 of the United States Revised Statutes does not entitle the petitioner to be admitted to bail pending said extradition proceedings.

Wherefore your petitioner prays that the order dismissing the said writs of *habeas corpus* and certiorari and remanding your petitioner to the custody of William Henkel, United States marshal for the southern district of New York, and denying his right to be admitted to bail, be reviewed and that your petitioner be discharged from custody.

WHITAKER WRIGHT,
By LOUIS MARSHALL,
His Attorney, Petitioner.

LOUIS MARSHALL,
Attorney for Petitioner, 30 Broad Street, New York City.

(Endorsed:) United States circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and Great Britain.—Assignment of errors.—Louis Marshall, attorney for petitioner, 30 Broad street, New York city.—U. S. circuit court, southern district of New York, Filed Apr. 7, 1903, John A. Shields, clerk.

43 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application for the Extradition of WHITAKER WRIGHT under the Treaty Between the United States and Great Britain.

Know all men by these presents, that we Whitaker Wright, principal, and Anton J. Dittmar, surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars to be paid to the United States of America; for which payment well and truly to be made we bind ourselves, our

heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this sixth day of April, nineteen hundred and three.

Whereas, lately at a stated term of the circuit court of the United States for the southern district of New York, in a proceeding therein pending, an order was entered dismissing a writ of *habeas corpus* and of certiorari sued out by the said Whitaker Wright as petitioner, and remanding the said petitioner to the custody of William Henkel, United States marshal for the southern district of New York and denying his application to be admitted to bail pending the extradition proceedings upon which he has been arrested and is in the custody of the said United States marshal; and the said petitioner having appealed to the Supreme Court of the United
44 States and his appeal having been allowed, and a copy of his petition for appeal having been filed in the clerk's office of the United States circuit court for the southern district of New York in order to obtain a review of the aforesaid order.

Now, the condition of the above obligation is such, that if the petitioner Whitaker Wright shall prosecute his appeal to effect and shall answer all questions if he shall fail to make the said appeal good, then the above obligation to be void, otherwise to remain in full force and effect.

WHITAKER WRIGHT.
A. J. DITTMAR.

STATE OF NEW YORK, } ss:
County of New York, }

Anton J. Dittmar, surety to the foregoing undertaking, being sworn, says that he is a resident and householder within the State of New York, and is worth the sum of five hundred dollars over all the debts or liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

A. J. DITTMAR.

Sworn to before me this 6th day of April, 1903.

LOUIS MALTHANER,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in New York Co.

45 STATE OF NEW YORK, } ss:
County of New York, }

I certify, that on this sixth day of April, 1903, before me appeared the above named Whitaker Wright known to me and to me known to be one of the individuals described in and who executed the above undertaking, and duly acknowledged to me that he executed the same.

HYMAN ROSENSCHEIM,
Notary Public, N. Y. Co.

[SEAL.]

STATE OF NEW YORK, } ss:
County of New York, }

I certify, that on this sixth day of April, 1903, before me appeared the above named Anton J. Dittmar, known to me and to me known to be one of the individuals described in and who executed the above undertaking, and he duly acknowledged to me that he executed the same.

LOUIS MALTHANER,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in New York Co.

(Endorsed:) United States circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and Great Britain.—Security for costs.—Louis Marshall, attorney for petitioner, 30 Broad street, New York city.—The within bond is
46 approved as to form, amount and sufficiency. April 7, 1903.
E. Henry Lacombe, U. S. C. J.—U. S. circuit court, southern district of New York, Filed Apr. 7, 1903, John A. Shields, clerk.

47 UNITED STATES OF AMERICA, }
Southern District of New York. }

To William Henkel, United States marshal for the southern district of New York, and Sir Percy Sanderson, His Britannic Majesty's consul general at the port of New York:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on or before the 11th day of April, nineteen hundred and three, pursuant to an appeal on the part of Whitaker Wright filed in the clerk's office of the circuit court of the United States for the southern district of New York in a certain suit or proceeding entitled "In the matter of the application for the extradition of Whitaker Wright under the treaty between the United States and Great Britain," to show cause, if any there be, why the decision of the United States circuit court in the said appeal mentioned should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, southern district of New York, on the sixth day of April, nineteen hundred and three.

E. HENRY LACOMBE,
United States Circuit Judge.

LOUIS MARSHALL,
Attorney for Petitioner, 30 *Broad Street, New York City.*

(Endorsed:) United States circuit court, so. district of New York.—In the matter of the application for the extradition of Whitaker Wright, under the treaty between the United States and
48 Great Britain.—Citation.—Louis Marshall, attorney for petitioner, 30 Broad street, New York city.—Service of a copy of

the within citation is hereby admitted. Dated New York, Ap'l 7, 1903. Chas. Fox, attorney for H. B. M. C. J.—U. S. circuit court, southern district of New York, Filed Apr. 8, 1903, John A. Shields, clerk.

49 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the application for the extradition of Whitaker Wright under the treaty between the United States and Great Britain, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of April, in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States circuit court of appeals for the second circuit. In the matter of the application for the extradition of Whitaker Wright under the treaty between the United States and Great Britain. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 18,889. S. New York C. C. U. S. Term No. 661. Whitaker Wright, appellant, *vs.* William Henkel, United States marshal for the southern district of New York, *et al.* Filed April 11th, 1903.

FILE COPY. 31384

OCTOBER TERM, 1902.

No. 661

United States Supreme Court.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

WHITAKER WRIGHT,
Appellant,

against

WILLIAM HENKEL, Marshal of the United States for the Southern District of New York,
Appellee.

In the Matter of the Application for the Extradition of
WHITAKER WRIGHT
Under the Treaty between the United States and Great Britain.

AFFIDAVIT AND NOTICE OF MOTION TO ADVANCE CAUSE.

LOUIS MARSHALL,
Attorney for Appellant,
30 BROAD STREET,
New York City.

C. G. Burnham, Walker and Centre Streets, N. Y.

31385

Supreme Court of the United States.

WHITAKER WRIGHT,
Appellant,

AGAINST

WILLIAM HENKEL, Marshal of the United States for the Southern District of New York,
Appellee.

October Term, 1902.

IN THE MATTER

OF

The Application for the Extradition of WHITAKER WRIGHT under the Treaty between the United States and Great Britain.

No.

SIRS: Please take notice that a motion will be made herein before the United States Supreme Court at a session thereof to be held at the Capitol in the City of Washington, D. C., on Monday, the 13th day of April, 1903, at twelve o'clock noon, or as soon thereafter as counsel can be heard, for a rule or

order advancing this cause and setting it down for hearing and argument on a day fixed by the Court.

Dated, New York, April 7th, 1903.

Yours, etc.,

LOUIS MARSHALL,

Attorney for Appellant,

Office & Post-Office Address:

30 Broad Street,

Borough of Manhattan,

New York City.

To WILLIAM HENKEL,

Marshal of the United States for the Southern District of New York.

CHARLES FOX, ESQ.,

Attorney for His Britannic Majesty's Consul-General at the Port of New York.

SUPREME COURT OF THE UNITED STATES.

WHITAKER WRIGHT

AGAINST

WILLIAM HENKEL, Marshal of the United States for the Southern District of New York

IN THE MATTER

OF

The Application for the Extradition of WHITAKER WRIGHT under the Treaty between the United States and Great Britain.

UNITED STATES OF AMERICA
Southern District of New York } ss.

LOUIS MARSHALL, being duly sworn, deposes and says:

I am the attorney for Whitaker Wright, the appellant herein. He is now in the custody of William Henkel, Marshal of the United States for the Southern District of New York, under a warrant of commitment to him issued by one Thomas Alexander, United States Commissioner for the Southern District of New York, upon the complaint of His Britannic Majesty's Consul General at the Port of New York. The complaint and warrant charge the appellant with having committed fraud in England while acting as a director of an English corporation.

Upon his arraignment before the Commissioner an application was made to discharge the applicant on the

ground that the offence charged against him was not an extraditable offence within the meaning of any treaty between the United States of America and the United Kingdom of Great Britain and Ireland, the provision of the said treaty on which the prosecution relies confining the right to extradite on the charge of the commission of fraud by a director of a company to cases where the act "is made criminal by the law of both countries."

This application was denied, and thereupon the appellant asked to be admitted to bail pending an examination into his alledged criminality. This application was denied on the ground that no power of jurisdiction existed to admit one arrested in extradition proceedings to bail.

Writs of *habeas corpus* and *certiorari* were then sued out from the Circuit Court of the United States for the Southern District of New York on the ground that no extraditable crime had been charged against the appellant, and that in any event the appellant should be admitted to bail. After a hearing on said writs the Court dismissed them, holding that the offence charged against the appellant was extraditable and that no jurisdiction or power existed in the United States Circuit Court to admit one arrested in extradition proceedings to bail.

An appeal has been taken from this determination to this Court.

The appellant is still in custody. No hearing on the merits of the charge made against him has as yet taken place, the prosecutor having obtained adjournments of the proceedings to await the arrival of depositions from England; and it has been stated before the Commissioner that other applications for adjournment will in all probability be made from time to time.

The charges made against the appellant are of such a nature as to involve an elaborate and intricate investigation into books of account, and in all likelihood a long time will elapse before such hearing is completed. In the meantime, unless the appellant is

admitted to bail, he will continue in confinement in the County Jail of the County of New York commonly known as Ludlow Street Jail, for an indefinite period.

No indictment has been found against the appellant in England. I am informed and verily believe that the charges now made against him have been considered in the public press of England for more than two years past; were the subject of investigation by the Attorney General and Solicitor General of England, and, in response to interrogations made in the House of Commons by members of Parliament, both the Attorney General and Solicitor General stated that as a result of their investigation into the charges made against the appellant they had come to the conclusion that no crime had been committed by him. Yet he is now subjected to imprisonment and has been denied the right to give bail pending the preliminary investigation into his alleged criminality.

LOUIS MARSHALL.

Subscribed and Sworn to before me this 8th day of April, 1903.

GEO. F. BEHRINGER, JR.
Notary Public,
Rockland Co.
Certf. filed in N. Y. Co.

FILE COPY.

Office Supreme Court U.S.
FILED
APR 25 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States, 1

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal, Southern District of New York *et al.*

2

3

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

CHARLES FOX, being duly sworn, doth depose and say that he is attorney for Sir Percy Sanderson, His Britannic Majesty's Consul-General, at the Port of New York, in the proceedings for the extradition of the appellant, and has represented him in all the proceedings for the extradition of the above-named appellant.

That on the 31st day of March, 1903, after the entry of the order, by the Circuit Court of the United States for the Southern District of New York, discharging the writs of habeas corpus and certiorari (page 13 of the Record), Sir Percy Sanderson and your deponent appeared before Thomas Alexander, Commissioner in the

4

extradition proceedings, and a complaint was then and there made by Sir Percy Sanderson, a copy of which is as follows:

UNITED STATES OF AMERICA, } ss.:
Southern District of New York,}

PERCY SANDERSON, His Britannic Majesty's Consul-General at the Port of New York, being duly sworn, doth depose and say upon information and belief:

FIRST.—That one Whitaker Wright, did heretofore and in or about the month of October, 1899, and in or about the month of December, 1900, in the City of London, in that part of the United Kingdom of Great Britain and Ireland, called England, and within the jurisdiction of His said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in or about the month of October, in the year 1899, and in or about the month of December, 1900, at the City of London, aforesaid, then being a director and manager of a certain company or body corporate, to wit, the London and Globe Finance Corporation, Limited, unlawfully make, circulate and publish, and concurred in making, publishing and circulating certain written statements of accounts, viz.: annual reports, balance sheets and statements of accounts of said company or corporation for periods ending on the 30th day of September, in the year 1899, and on the 5th day of December, in the year 1900, which were false, and which he then knew to be false in material particulars, with intent thereby to deceive and defraud members, shareholders and creditors of said company or corporation, and with intent to induce persons to become shareholders in the said company or corporation, and to entrust and advance property to said company or corporation, and to enter into security for the benefit thereof; and did also, at the times and places aforesaid, then being a director and manager of said company or corporation, aforesaid, with intent to defraud, alter and

falsify, books, papers and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons.

SECOND.—That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

THIRD.—That the crime of which the said Whitaker Wright is herein charged is an offence within the treaty between the United States and Great Britain, and is made criminal by the laws of both countries.

FOURTH.—That deponent's information and belief are based upon a certified copy of a warrant, issued by one of His Majesty's Justices of the Peace, for the City of London, for the apprehension of the said Whitaker Wright, for the offence herein first enumerated, and a certified copy of the information and complaint of the Senior Official Receiver in Companies Liquidation (acting under the order of the High Court of Justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams, on which information and complaint and depositions, the said warrant was granted for the apprehension of the

13 said Whitaker Wright, all of said certified copies of warrant, information and complaint and depositions being certified as required by the Act of Congress of August 3, 1882, and are presented herewith, and that deponent's information and belief as to the other charges herein are based upon messages received by cable from His Majesty's Secretary of State for Foreign Affairs, one of the said messages enumerating the charges as herein stated, and a message received by cable by deponent from His Majesty's said Secretary of State, on
14 the 28th inst., stating that the further papers in support of the charges herein were dispatched to deponent by the mail of the 28th inst.

PERCY SANDERSON.

Subscribed and sworn to before me this 31st day of March, 1903.

THOMAS ALEXANDER,
U. S. Commissioner for the Southern District of New York, and Commissioner
15 duly authorized by the District Court of the United States, for the Southern District of New York, and also a Commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign Government.

16 That thereupon a warrant was issued by the said Commissioner, a copy of which is as follows, together with the endorsements thereon by the United States Marshal and Commissioner Alexander:

17

The President of the United States to any Marshal of the United States; to any Deputy of any such Marshal, or any or either of them:

Whereas, complaint has been made on oath under the Treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the Supplementary Treaty between the same High Contracting Parties, signed 18
July 12th, 1889, before me, Thomas Alexander, one of the Commissioners appointed by the District Court of the United States for the Southern District of New York, and also Commissioner especially appointed to execute the Acts of Congress, entitled, "An Act for "Giving Effect to Certain Treaty Stipulations, between "This and Foreign Governments for the Apprehension "and Delivery of certain offenders," approved August 12th, 1848, and of the several acts amendatory thereof, that one Whitaker Wright, did heretofore and in or 19
about the month of October, 1899, and in or about the month of December, 1900, in the City of London, in that part of the United Kingdom of Great Britain and Ireland, called England, and within the jurisdiction of His said Britannic Majesty, commit the crime of fraud as a director of a Company, to wit: did heretofore and and in or about the month of October in the year 1899, and in or about the month of December, 1900, at the City of London, aforesaid, then being a director and manager of a certain company or body corporate, to 20
wit, the London and Globe Finance Corporation, Limited, unlawfully make, circulate and publish, and concurred in making, publishing and circulating certain written statements of accounts, viz.: annual reports, balance sheets and statements of accounts of said company or corporation for periods ending on the 30th day of September, in the year 1899, and on the 5th day of December, in the year 1900, which were false, and

which he then knew to be false, in material particulars, with intent thereby to deceive and defraud members, shareholders and creditors of said company or corporation, and with intent to induce persons to become shareholders in the said company or corporation, and to entrust and advance property to said company or corporation, and to enter into security for the benefit thereof; and did also, at the times and places aforesaid, then being a director and manager of said company or corporation, as aforesaid, with intent, to defraud, alter and falsify, books, papers and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also at the times and place aforesaid, then being a director of the said company or corporation, as aforesaid, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said Company or corporation, with intent to defraud and deceive shareholders and creditors of said Company or corporation, and other persons; and that the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States, and that the crime of which the said Whitaker Wright is herein charged is an offence within the Treaty between the United States and Great Britain, and is made criminal by the laws of both countries.

Now, therefore, we command you forthwith to take the said Whitaker Wright, and bring him before me, the said Commissioner, at my office, Room 60, in the Post Office Building, in the City of New York, in order that the evidence of the criminality of the said Whitaker Wright, may be heard and considered, and if deemed sufficient to sustain the charge that the same may be certified together with a copy of all the pro-

ceedings to the Secretary of State, that a warrant may issue for the surrender pursuant to the said treaty.

Witness my hand and official seal the 31st day of March in the year 1903.

THOS. ALEXANDER,

U. S. Commissioner for the Southern District of New York and Commissioner duly authorized by the District Court of the United States, for the Southern District of New York, and also Commissioner appointed under the Laws of the United States concerning the extraditions of fugitives from the justice of a foreign government under a treaty or convention between this and any Foreign Government.

[SEAL.]

The within writ was received March 31st, 1903, and the same was executed by arresting the within-named Whitaker Wright, on March 31st, 1903, and I now produce his body before Comr. Alexander as therein commanded.

WM. HENKEL,
U. S. Marshal for S. D. N. Y.

March 31st, 1903.

Prisoner arraigned, examination demanded and set for April 8th, 1903, at 2 P. M., prisoner committed to custody of Marshal.

THOS. ALEXANDER,
U. S. Comr.

N. Y., March 31, 1903.

29 Hearing adjourned to April 15th, 1903, at 2 P. M.
N. Y., April 8th, 1903.

THOS. ALEXANDER,
U. S. Comr.

Hearing adjourned to April 23rd, 1903, at 2 P. M.
N. Y., April 15th, 1903.

THOS. ALEXANDER,
U. S. Comr.

30

That the said appellant, Whitaker Wright, was arrested under the said warrant of March 31, 1903, and arraigned before Commissioner Alexander on that day, and an examination demanded by the appellant which was set for April 8, 1903. The deponent at that time (March 31), before the Commissioner, stated that the demanding Government would abandon all further proceedings instituted under the complaint in the proceed-
31 ings instituted under the complaint in the proceedings for the extradition of Whitaker Wright, dated March 16, 1903, and that the demanding Government consented to the discharge of the prisoner from arrest under the warrant issued on the complaint of March 16, 1903.

That on April 8, 1903, a similar statement was made on behalf of the demanding Government that it abandoned all proceedings under the complaint of March 16, and consented to the discharge of the ap-
32 pellant under that warrant.

That annexed hereto and hereby made a part of this affidavit, is a copy of the Stenographer's Minutes of the proceedings before Commissioner Alexander from the time of the entry of the order dismissing the writ of *habeas corpus* to April 15, 1903, and also affiant has a copy of the Stenographer's Minutes of the proceedings before the Commissioner on both complaints of March 16th and March 31st, certified to by the said Commis-

sioner which he has here ready to present to this Honor- 33
able Court for its consideration.

That the demanding Government is still willing and consents to the discharge of the appellant from custody under the warrant of March 16, 1903.

That this affidavit is made and presented to this Court by the affiant as counsel for the appellee for the sole and express purpose of advising this Court that all proceedings have been abandoned by the demanding government under the complaint and warrant of March 16th, and that all further proceedings are had under and by 34
virtue of the complaint and warrant of March 31st, 1903, and not otherwise. And further affiant saith not.

CHAS. FOX.

Subscribed and sworn to before me this
22nd day of April, in the year 1903.

HENRY H. MCCORKLE,
[SEAL.] Notary Public. 35
New York Co.

36

37

Copy of stenographic minutes referred to in the foregoing affidavit.

In the Matter

OF

The application for the extradition of WHITAKER WRIGHT, under the
38 Treaty between the United States and Great Britain.

Proceedings before COMMISSIONER ALEXANDER, in the United States Court House and General Post Office Building, in the City of New York, March 31, 1903.

PRESENT:

39 THE PRISONER.
MR. CHARLES FOX, for the demanding government.
MR. LOUIS MARSHALL and MR. UNTERMYER, for the prisoner.

The prisoner arraigned.

Examination demanded and set for April 8, 1903.

On behalf of the demanding government, it was announced that it would abandon the proceedings instituted under the complaint dated March 16, and that it consented to the discharge of the prisoner from arrest
40 under the warrant dated March 16, and would proceed under the complaint sworn to before the Commissioner and dated March 31, upon which complaint a warrant had been issued by the Commissioner to-day.

The Commissioner announced that, as the proceedings under the warrant of March 16th had been carried into the Circuit Court by writ of certiorari, he is without power to discharge the prisoner under such warrant.

The demanding government announces that an order was entered on March 30, 1903, dismissing the writs of certiorari and habeas corpus and remanding the prisoner to the custody of the marshal. 41

Counsel for the prisoner states that papers are being now prepared, on behalf of the prisoner, for the purpose of removing the case to the Supreme Court of the United States, and that an application is to be made to that Court to advance the cause to a speedy hearing.

The Commissioner announced that, pending such proceedings, the Commissioner is without power to dismiss the complaint and discharge the prisoner. 42

Proceeding adjourned to April 8, 1903, at 2 P. M.

NEW YORK, April 8, 1903.

PRESENT:

THE PRISONER. 43
MR. FOX for the demanding government.
MESSRS. MARSHALL and UNTERMYER, for the prisoner.

Mr. Marshall announces that an appeal has been allowed to the Supreme Court of the United States by Judge Lacombe, whereby the questions involved on the hearing on the writs of habeas corpus and on the certiorari proceeding referred to at the last session, are to be reviewed by the Supreme Court of the United States; that citation has been duly issued and has been served; petition for appeal has also been served upon Mr. Fox, counsel for the demanding government, and that a motion has been made, returnable before the Supreme Court on the 13th day of April, for a ruling or order advancing the cause and setting it down for a prompt hearing. 44

Mr. Fox renews his motion for the discharge of the prisoner under the warrant issued on the complaint of

45 March 16th, and repeats his announcement that the demanding government do not proceed further under that warrant or complaint. And, further than that, the proceeding cannot remain open except at the instance of the demanding government, and that the demanding government cannot legally proceed under the complaint and warrant of March 31st until the other proceeding is ended and terminated.

The motion to dismiss the prisoner under the warrant of March 16th, is again denied for the lack of
46 power on the part of the Commissioner, and, in view of the position of counsel for the prisoner and the waiver by them of any objections to proceeding by reason of the pendency of the proceedings under the writ of error, the Commissioner announces that the demanding government should proceed with its case.

MR. MARSHALL: Of course, I am not in any way conceding or admitting that there is any crime charged in the complaint or warrant now before you, which is extraditable. I merely say that I do not object to pro-
47 ceeding under the present warrant on the ground that there is pending in the Supreme Court of the United States the proceeding for the review of the other proceeding. Of course, I shall move to dismiss these proceedings also.

MR. FOX: Then I ask, if counsel has any motion to make as against that complaint, to make it now.

MR. MARSHALL: I will make it now. I move to dismiss the complaint in this matter on the ground that the complaint does not state sufficient facts to constitute
48 any crime which is extraditable within the meaning of any of the treaties between the United States of America and the United Kingdom of Great Britain and Ireland. Second, that there is no allegation or statement in the complaint which indicates that the offence charged in this complaint or warrant constitutes a crime under the laws of both countries, viz., the United States of America and the United Kingdom of Great Britain and Ireland. Third, on the ground that it does not

appear from the complaint or warrant that the crime charged is a crime under the general law of the United States. Fourth, on the ground that the complaint does not show that the offence charged against the defendant is a crime within the laws of the State of New York. I believe that covers it. 49

Motion denied.
Exception taken.

MR. FOX: The demanding Government offers in evidence the information and complaint of the Senior Official Receiver in Companies Liquidation of the London and Globe Finance Corporation in liquidation, acting under the order of the High Court of Justice, and the depositions of Arthur Russell and John Flower, George Jarman and H. G. Abraham, and the Exhibits attached to the depositions which are certified under the Act of August 3, 1882, by the Ambassador of the United States of America. And attached to those papers there is a copy of a warrant dated March 11, 1903, for the apprehension of the accused for the offence charged. 50 51

The right of the defendant to make objection to these papers, after an opportunity to examine the papers, is reserved.

MR. FOX: I offer a certified copy of an order of Mr. Justice Buckley of the High Court of Justice, ordering this prosecution, and certified in the same way by the Ambassador. 52

The right of the defendant to object to the paper is also reserved.

MR. FOX: I offer in evidence information and complaint and the depositions of the Senior Official Receiver in Companies Liquidation acting under the order of the High Court of Justice, and the depositions of Arthur Russell, Frederick Davey, William John Hiam,

53 John Flower, and John Willis, and A. Pentin and Benjamin Nicholson and Albert Edward Flower.

The same right of objection is reserved to the defendant.

MR. FOX: Those are the papers that we have to-day. Now, I am inclined to believe that the other depositions coming are merely cumulative. I ask for an adjournment, and I will introduce the laws and complete my case next Wednesday, so far as I am advised at
54 present.

Examination adjourned to Wednesday, April 15th, at 2 P. M.

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FILE COPY.

Office Supreme Court U. S.
FILED
APR 27 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, and others.

UNITED STATES OF AMERICA,
State of New York, } ss.
COUNTY OF NEW YORK,

WHITAKER WRIGHT being duly sworn says: I am the appellant named in the above entitled proceeding now pending in this Court.

I am a citizen of the United States and now am and have been ever since March 15th 1903 confined in the County jail in the County of New York in custody of the United States Marshal for the Southern District of New York.

The complaint upon which the warrant was issued was made by Sir Percy Sanderson, His Brittannic Majesty's Consul General at the Port of New York, and is to the effect that in the month of December 1900 at the City of London, England, I then being a Director of a corporation known as The London & Globe Finance Corporation, did unlawfully make, circulate and publish certain reports and statements of the ac-

counts of said corporation which were false; that I well knew such reports and statements to be false and that they were so circulated and published with intent to deceive and defraud the shareholders or members of the corporation.

In that connection it is also charged that I am a fugitive from the justice of the Kingdom of Great Britain & Ireland.

I am informed and believe that the complaint now before this Court is not the one upon which I was originally arrested, but that after my arrest it was abandoned and superseded on March 16, 1903, by the complaint now before this Court and subsequently on the 31st day of March 1903 which was more than two weeks after my arrest and arraignment under the warrant here in question and after I had offered bail and had been refused by the Commissioner, on the ground of want of power, and my application to be discharged on the ground that the offense charged was not extraditable had also been refused by the Commissioner, another complaint was lodged against me and another warrant issued.

This was all subsequent to the decision of the United States Circuit Court here under review dismissing the writ of *habeas corpus* and after these proceedings had been taken.

I am advised and believe that the complaint of March 31st presents the same questions of law as those raised by the present record. The Commissioner before whom the proceedings are pending apparently takes the same view, as will appear from the minutes of the proceedings that have been had before him within the past ten days, extracts from which are hereto attached marked "A" which I ask to be regarded as embodied in this affidavit as part thereof

I have now been confined in jail for upwards of about six weeks and the Commissioner before whom the proceedings of March 31st are pending has, against my protest, refused to proceed with the hearing until the determination of the present appeal

If this Court should decline to review the questions of law raised by the record because of the subsequent complaint made against me which I am advised presents the same questions of law, it will be impossible for me to secure a review of those questions until after the Summer vacation and as a result I shall be compelled to suffer seven months or more of imprisonment without a hearing.

I am innocent of the charges made against me.

The facts with respect to my connection with the London & Globe Finance Corporation are briefly as follows :

I was the prime mover in the organization of that Company in 1897. It was formed with a capital of £2,000,000 to acquire certain mining claims, options, properties and shares that had been owned by the West Australian Exploring and Finance Corporation and a company also named the London & Globe Finance Corporation. The purpose of the company was to engage in the highly speculative business of acquiring prospects and undeveloped mining properties and of buying, selling and dealing in mining and other shares on the stock exchange and otherwise.

I was a Director of that corporation from the time of its organization until December 28th 1900 at which time it was placed in the hands of Voluntary Liquidators. Subsequently, the Liquidators were superseded by the Official Receiver under an order of the English Courts in a proceeding for the compulsory winding up of the corporation.

Its collapse was brought about by a speculation in the purchase of the shares of a valuable mining property known as the Lake View Consols Company the shares of which were being purchased on an agreement with a responsible syndicate to loan £1,500,000 toward paying for the shares so to be purchased. The syndicate made the first advance of £500,000 but defaulted on the further payments.

As a result of the failure of the London & Globe Corporation, two other companies that were allied with

it in the same line of business known as the British America Corporation with a capital of £1,500,000 and the Standard Exploration Company with a like capital were also forced into liquidation.

Following the collapse of these companies there was a full public investigation of all their affairs and particularly of all the business and transactions of the London & Globe Corporation about a year and a half ago & after the affairs of the corporations with which I was connected had been fully investigated by the Official Receiver and a committee of creditors, there was a public examination under the Companies Acts at which I was subjected to cross-examination by the Official Receiver on behalf of the Government and by counsel representing various of its creditors and shareholders, covering four days, and in connection with which many witnesses were examined on other days. The questions and answers and all the proceedings were widely published in the daily papers which contained *verbatim* reports of the testimony. In the course of these proceedings I was fully inquired of and made answers concerning all the transactions, statements and accounts that formed the subject matter of the complaint on which I am now deprived of my liberty.

The Official Receiver whose duty it was to prosecute me if any criminal offense had been disclosed either by his investigations through his accountants or otherwise or by the public examination, took no action as the result of the investigations or of such public examination.

Under the English law as to corporations of this character it is permitted to any person interested in the affairs of the corporation to institute criminal proceedings on behalf of the Crown in evidence that a crime against the People has been committed. Such an application was made and pressed through eminent counsel who submitted a mass of documents in support of their contention. The Public Prosecutor however, refused to prosecute on the ground that there

was no proof of the commission of a criminal offense. The Attorney General who is one of the Cabinet Ministers of the Government was also appealed to and he too declined to direct a prosecution. The question whether or not there should be such a prosecution was then raised in the House of Commons and was the subject of debate between the opposing political parties. The Attorney General, the Solicitor General, and the Prime Minister all took the position that the acts complained of did not constitute a criminal offense which would justify the People in instituting a prosecution and that they were within the law. The Government was sustained in its position.

Attached hereto marked "Exhibit B" is an excerpt from the affidavit of the Official Receiver which was submitted on the application before Mr. Justice BUCKLEY, which I believe correctly states the proceedings that preceded the application for a private prosecution. The chief agitator in favor of criminal prosecution against me arising out of the failure of the London & Globe Corporation was Mr. John Flower, a member of a firm of stock brokers in London, who were creditors of the corporation. I refer to a circular issued by him, a copy which is here to annexed and marked Schedule C. After the failure of the Corporation I had applied the remains of my private fortune earned in other enterprises, toward the payment in full of my individual obligations and had discharged among other debts that of Mr. Flower's firm to the amount of nearly £50,000. When Mr. Flower had failed in his numerous attempts extending over two years to induce public officials to proceed against me, application to Mr. Justice BUCKLEY was made under a provision of the Companies Acts permitting a private prosecution with the assent of the Court. I had no notice of that application; the law required none to be given me. I was not represented by counsel and my English Counsel has thus far been unable to secure access to the exhibits that were before the Court on that application. He has made

application but has been denied on the ground, as I am informed and believe, that the proceeding was *ex parte*, secret in its nature, and that I was not entitled to know upon what affidavits the Judge had acted. By the courtesy of some of the parties, my counsel was able to obtain some of the earlier affidavits, including that of the Official Receiver above referred to.

The charges made against me are four in number. They may be briefly summarized as follows :

1. That being one of the Directors of the London & Globe Corporation, I concurred in the issuance of a report or balance sheet to the stockholders for the year ended Sept. 30th 1899 containing the following item :

> " Cash at Bankers £534,555, 17 sh. 3d."

2. That I concurred in the following statement in the balance sheet of December 5th 1900 :

> " Shares held in sundry companies £2,333,632, 0 sh. 1 d."

3. That I concurred in omitting from the balance sheet of Dec. 5th 1900, liabilities of the Corporation to stock brokers amounting to £1,603,456.

4. That the balance sheet of December 5th 1900 also contained the following statement said to be false :

> " By securities realized and mining properties purchased and resold account (being balance of profit thereon after allowing for depreciation on securities held) £479,399, 15 sh. 4 d."

With respect to these charges I beg to state briefly as follows :

I am not an accountant or a book-keeper. Although I was one of the Directors of the corporation and the

Managing Director, I did not have immediate charge of the books of account. The book-keeping was complicated. We had a salaried accountant with assistants and an extensive department devoted to book-keeping. I never in fact saw the inside of any of the books during the existence of the Corporation nor inspected any of the entries in them. Besides the salaried accountants, the Corporation had a firm of Chartered Accountants who checked and investigated the accounts from time to time and whose certificate was attached to each of the statements or reports concerning which I am charged with fraud.

As to the first charge:—The amount of cash stated in the report as being in hand and at Bankers, to wit, £534,555, 17 sh. 3d., was in fact in hand and at Bankers at that time. It is true that part of it had been borrowed from allied corporations, but the liability appeared upon the other side of the account. The statement that this cash was in hand was in no sense false.

As to the second charge:—The placing of the mining shares held in other companies at £2,233,632, 0sh. 1d. was in no respect false. The balance sheet for the preceding year had advised the shareholders of the uniform method adopted by the Company from the date of its organization in 1897 of valuing the shares for the purpose of its balance sheet, namely, all shares purchased being taken at cost, and all shares acquired by promotion of subsidiary companies being taken at their par value irrespective of the fluctuating market value of these shares on the date of the balance sheet. It was in accordance with this custom that the shares were so valued at the date of the December 1900 balance sheet. It was a more reliable method of valuation with respect to speculative securities, than to arbitrarily take the price prevailing on the date of the balance sheet.

This method was never objected to by any of the shareholders at the various meetings. It often happened, as it did with respect to the shares on hand at the time of this balance sheet, that many of them were

worth far in excess of the par value. Sometimes there was no market for the shares. They were subject to violent fluctuations due to the fact that they represented speculative holdings which might become valuable or valueless over night as the result of rich discoveries or great disappointments.

The balance sheet of December 1900 now complained of, contains as part of it, as is required by the Companies Acts, the certificate of the Chartered Accountants in which certificate there occurs the following qualification :

> " Subject * * * * to the sum written off being adequate in respect of shares held in the allied companies and various other undertakings, we are of opinion that the balance sheet correctly represents the position of the Company's affairs as shown by the books. We have verified the balance of cash at the Bankers and in hand, and examined the securities, and find the same to be in order."

It should be said in this connection that in arriving at this valuation of the shares as £2,333,632, 0 sh. 1d. there was first deducted for depreciation on the securities during the year the sum of £1,383,849, 19sh. 11d. which included a sum of about £700,000 lost in depreciation in the shares of a Company known as " Lake View Consols, Limited " in connection with which there had been a large profit in one of the preceding years.

There was nothing improper or unusual in the valuation of the shares, that was adopted, and the method was adopted after enquiry as that pursued by several other leading Exploration Companies in London.

As to the third charge :—This claim that an item of liabilities of £1,603,456 was omitted from the balance sheet of Dec. 1900 is without foundation.

It appears that the Globe Corporation and the Standard Exploration Company which was one

of its allied companies working in close connection with it in the same line of business, were engaged in a joint speculative venture involving the purchase of shares of the Lake View Mine. The Boards of Directors of both companies, part of whom were the same individuals and part of the Standard Directors being different persons, formally met and agreed that the Standard Company would take over the entire account and assume all the obligations of purchase, relieving the Globe Corporation of those obligations and of the shares. Accordingly at and as of the date of the balance sheet there was very properly omitted from it a liability owing to brokers on account of the purchase of these shares, and there was also omitted from the other side of the account, the ownership of the shares, the actual and market value of which was greater than the amount owing upon them. The result of that transaction was to make the net assets of the Globe Corporation appear less than they would have been if the Standard Company had not taken over the shares.

The claim that I was privy to the making of a false report in this respect because I concurred in the omission of the liability owing the brokers on account of this purchase of shares, is based on the purely technical ground that although the Standard Corporation which was a solvent concern had assumed the obligation and taken over the shares, yet the contracts with the brokers for their purchase had been made in the name of the Globe Corporation and as the Bookers had not assented to the transfer of the liability to the Standard Corporation there was an obligation on the part of the Globe Corporation to them which should have appeared as a liability. That is the sole basis for the charge, and as before stated, I was neither the Accountant nor the Book-keeper of the Company, nor was it possible for me to keep in immediate personal touch with the multitude of transactions that were daily taking place. The Standard Corporation was amply responsible for the obligation,

which as before stated was less than the value of the shares acquired against it. Between the date of the transfer of that account to the Standard Corporation and the date of the report, there was a substantial increase in the market value of those shares, so that in that respect also the omission of the transaction because of its having been taken over by the Standard Corporation, made a less favorable showing for the Globe Corporation than if that transaction had been included. In short the liability on these shares having been transferred to the Standard, the shares themselves, an asset of greater amount than the liability, were also transferred to the Standard, and there was no fraud whatever in the transaction.

The attempt to charge this transaction against me as a crime is a fair illustration of the cruel and venomous prosecution to which I have been subjected at the hands of Mr. Flower.

As to the fourth charge :—This is based on the assertion of an alleged profit of £564,285 on 200,000 Victorian Gold Estates shares of £1 each.

It is claimed that these shares which had been regarded by the London & Globe Corporation as worth only £1 each, were increased in value in the balance sheet to £5 each, so far as concerned £125,000 of such shares. The fact is the mining properties of the Victorian Gold Estates were sold to two corporations, one known as Loddon Valley Gold Fields and the other as Moorlort Gold Fields, with £5 shares.

The old Victorian Company had no working capital and was otherwise in a crippled condition. Its shares were of the par value of £1 each. The shares of the new companies were of the par value of £5 each and were in companies the properties of which had been developed and which had working capital. These shares of the new companies, in accordance with the uniform custom above referred to, were placed in the balance sheet at their par value, as the old shares had been.

Between the time of the organization of the old

London & Globe corporation and the collapse in 1900 there was distributed by the corporation and its allied and subsidiary companies about £5,000,000 in dividends earned from the ventures with which it was connected. Its public issues and other enterprises had for years been almost uniformally successful so that the securities or companies with which it was identified were at a substantial premium. It did not meet with reverses until within fourteen months of its failure, and these reverses were mainly the result of treachery both at the mines and in London.

The above explanation, which covers all the charges made against me, is necessarily brief and partial as the history of these various transactions is lengthy and somewhat complicated. All of them were fully explained by me in the aforesaid public examination at which the Directors of the various companies, the book-keepers, accountants and other witnesses conversant with the transactions were called, examined and cross-examined at great length nearly a year and a half ago. All the facts now known were then known and were familiar to the Public Prosecutor, the Official Receiver and other public officials during the year or more after the public examination. I remained in England and was accessible during all that time.

It is not now and has never been charged that I profited personally by any of these transactions or that there was the slightest corruption or dishonesty on my part in dealing with the affairs of the corporation. On the contrary, at the close of the public examination, the Official Receiver admitted openly in Court and it was placed upon the record, that I was a creditor of the London & Globe Corporation to the extent of £50,000. That sum however represents but a mere fraction of my losses sustained upon the collapse of the Corporation and its allied companies. I did everything in my power, to the extent of sacrificing a large part of my private fortune which I had amassed in business enterprises prior to the organization of these

companies, in the attempt to save the companies from collapse.

The collapse was brought about as before stated, by the refusal of a syndicate of men largely responsible financially to meet their obligations, and was sudden and unexpected.

I beg herewith to submit as part of this affidavit the testimony taken on the public examination above referred to, from which will appear all the facts connected with the transactions concerning which these charges were made against me.

I am ready and able to furnish such bail as may be required for my appearance to answer in the proceedings for extradition.

Since my incarceration I have been dangerously ill but have partially recovered. I am 57 years of age and am now so weak as the result of confinement and want of exercise that at times it is impossible for me to stand and I feel my health giving way under the restraint and manner of life to which I am being subjected.

I am not a fugitive from justice but remained in England courting a full investigation of all the affairs of the Company until the examination had been concluded and the public officials had declared me innocent of fraudulent intent. Then I devoted myself toward assisting the Official Receiver in realizing the assets. It was only after all this had been done that I left England to recuperate my health and fortunes. I then went to Paris where I met many of my English acquaintances, stopped in my own name at prominent hotels, went about in the streets, and then sailed for America partly to attend to my business interests here and in British Columbia and Australia, and partly to recuperate my health.

Both personally and through my counsel I offered to return to England if the extradition proceedings were dismissed so that I might voluntarily return as a free man to meet the charges, but this has been refused. I have been advised by my friends that by reason of

the systematic attacks made upon me through the press and otherwise since my departure, and the industrious dissemination of the charge that I have fled the jurisdiction, such prejudice has been created against me in England that it would be difficult for me to secure a fair trial at this time.

It is however my intention (if the charges made against me are held to be not extraditable and the prejudice created in England as to my having fled the jurisdiction is thus removed so that I can secure a fair trial), to return to England and meet these flimsy allegations as soon as my health will permit.

From my knowledge of my physical condition and of the climate here, I do not believe I could survive the Summer in confinement.

WHITAKER WRIGHT.

Sworn to before me this 25th day of April 1903.

SIMEON G. MANHEIM,
Notary Public,
New York County.

[SEAL.]

"EXHIBIT A."

Extract from proceedings before Thomas Alexander, Esq., United States Commissioner, on April 15 and 23, 1903.

In the Matter

of

The Application for the Extradition of Whitaker Wright.

New York, April 15, 1903.

Met pursuant to adjournment.

Present:

The Commissioner.

Mr. Fox for the demanding government.

The Prisoner.

Messrs. Untermyer & Marshall, for the Prisoner.

Mr. Untermyer: Do I understand counsel closes his case?

Mr. Fox: You do not understand that at this point, because I understand this case is to be held open until the decision of the Supreme Court, under the ruling of the Commissioner at the last hearing.

Mr. Untermyer: Do I understand that there was such a ruling?

Mr. Fox: If there is anything in the ruling of the Supreme Court which it becomes necessary for us to meet, we shall want to do so.

The Commissioner: I do not wish to have the case finally submitted to me until the Supreme Court finally rules upon the question before it.

MR. MARSHALL: You stated you would not make a final decision until the case was passed upon there, at the last hearing?

THE COMMISSIONER: I do not wish to have the case finally submitted to me until then, either.

MR. UNTERMYER: If your Honor please, I understand you made some suggestion at one of the previous hearings to the effect that you would not close this case until the decision of the Supreme Court.

THE COMMISSIONER: That is right.

MR. UNTERMYER: I am going to ask you to listen to some reasons which I shall present to you to be considered on that determination, and I think the reasons will appeal to you as being well founded. In the first place, of course, the defendant here has not been permitted to be bailed. He is in custody, and I think he is entitled to a speedy opportunity to have any questions that may be raised in connection with this extradition, determined. In the second place, I assume that your reason for coming to that conclusion was because of the fact that the question of law involved here may be presented to the Supreme Court and there determined. That is, the question of the extraditability of this offense.

THE COMMISSIONER: Partly that, but largely because the Commissioner feels that, without the consent of the attorneys for the defense, he has no authority to proceed in this case, pending that appeal.

MR. UNTERMYER: On this particular charge?

MR. MARSHALL: We insisted on this examination.

THE COMMISSIONER: Yes, and therefore I proceeded for the purpose of enabling the defense to have a full disclosure of the complainant's case and thus save time.

MR. UNTERMYER: May I inquire on what theory it may be contended that there is no jurisdiction to proceed with this case upon the writ of error on another charge.

THE COMMISSIONER: For the reason that when the *habeas corpus* was issued in the other case, the marshal

brough the prisoner before the Supreme Court, took him out of my charge entirely, and the vacating of that writ, had it not been stayed, as I claim, by the appeal, would have returned him to me. But there having been an appeal taken, I am very strongly of the opinion that the prisoner is not properly before me.

MR. UNTERMYER: He is in the jurisdiction of the Supreme Court still?

MR. MARSHALL: He was rearrested and came before you on a new charge.

THE COMMISSIONER: That may be sufficient to hold him in case the Supreme Court should sustain the writ and dismiss the prisoner, but I do not consider it is proper for the Commissioner at this stage of the proceeding, to proceed with the trial of the case. If I should make a final decision of the matter and discharge the prisoner, it would not be in my power to discharge him at the present time.

MR. UNTERMYER: That would raise another question, but we are here before you apparently by consent upon this charge.

THE COMMISSIONER: Simply for the purpose of getting the evidence before you so that you will not waste time after the determination of the matter before the Supreme Court, but will have the demanding Government's full case before you at that time and be prepared to meet it.

MR. UNTERMYER: We have felt and supposed and hoped that the defendant was before you for every purpose, so that we can get from you a determination of the proposition that may not be determined by the Supreme Court.

THE COMMISSIONER: Before directing the demanding Government to proceed with the case I informed you that I would not make any final determination of the matter, and I still hold to that view.

MR. UNTERMYER: Do you hold the view that the prisoner is not properly before you, and that the proceeding is irregular?

THE COMMISSIONER: In view of your waiver the prisoner is before me, I suppose.

MR. UNTERMYER: But did not we waive for every purpose then?

THE COMMISSIONER: No. I think there is something you cannot waive, and that is the fact that the prisoner is before the Supreme Court of the United States now.

MR. UNTERMYER: What we are anxious to reach, is a result, a determination by you of this question of law whether it is extraditable on the evidence subsubmitted by the demanding Government.

THE COMMISSIONER: That I will not determine until the Supreme Court acts on the question now before it.

MR. UNTERMYER: And I understand, for the reason you do not consider the prisoner as before you.

THE COMMISSIONER: And for the reason that a material point in this case on this complaint, is involved in the case before the Supreme Court.

MR. UNTERMYER: If that is so, then I quite agree that is a sufficient reason, but suppose the gentleman on the other side goes before the Supreme Court and takes the position that the raising of that question before the Court now is premature.

THE COMMISSIONER: I cannot consider what questions he will raise.

MR. UNTERMYER: Do I understand that any such position is to be taken, because it would not be fair to say to the Commissioner, we do not want you to pass on this question because it is before the Supreme Court, and then say to the Supreme Court that the raising of the question in the present proceeding is premature.

MR. FOX: That is a matter you have taken up.

Mr. UNTERMYER: We have not taken up the question that we shall not have a ruling now by the Commissioner upon the question of the extraditibility of this offense. If we are going to have a ruling of the Supreme Court on Monday and the question is going to be fairly submitted, as a great government should submit

a question of that kind, to the Court, that is one question. If, however, we are going to be met with a lot of technicalities on that subject, and have this proceeding held up and that proceeding held up, then I say we are subjected to a form of treatment that ought not to be encouraged. There is a position I want clear, and I do not think in a governmental proceeding of this kind any such technicality should be thrown in the way of a square determination of the great question at issue.

Now, may I ask, Mr. Commissioner, if your hesitation to hear us now on the question of the extraditibility of the offense, is based upon the ground that that is to be presented to the Supreme Court?

THE COMMISSIONER: I wish to have any light the Supreme Court can throw on that subject.

MR. UNTERMYER: Will you then inquire of the counsel representing the Government, whether they propose to present that question?

THE COMMISSIONER: No, I will not. I consider the complaint is before the Supreme Court, and when they act I will be in a position to decide.

MR. UNTERMYER: Which is practically the question of bail.

THE COMMISSIONER: It was fully argued in the Court below.

MR. UNTERMYER: It was presented below and we hope it will be in the Supreme Court, but I think the other side should say that question is going to be presented, without objection there, or present it here. We are entitled to have it presented somewhere at some time.

THE COMMISSIONER: I do not wish to consider it now at all.

MR. UNTERMYER: Mr. Commissioner, we very respectfully insist that we are entitled to have a hearing and determination upon the extraditability of this offense upon the proofs submitted by the complainant. As we understand it, the complainant has now closed its case.

MR. FOX: No, we reserve the right to introduce any additional evidence.

MR. UNTERMYER: I have not understood the Commissioner to grant any such right, and I do not suppose any such right would be granted unless counsel indicates what is their proof proposed to be submitted, and when, and why, in all the weeks that have transpired while this proceeding has been pending, the proof has not been submitted. Now, I am sure counsel does not want to resort to anything in the nature of pretext.

MR. FOX: Certainly not.

THE COMMISSIONER: I understand Mr. Fox to say so far as he knew his case was submitted.

MR. UNTERMYER: Are not we entitled to know whether his case is submitted or not? Somebody must know.

MR. FOX: As this case was taken up at the suggestion and the demand, I might say, of the accused we were directed to proceed although there were certain reasons that appeared to us which might make it a little questionable. Notwithstanding that we were directed to proceed, and we have proceeded, under the ruling of the Commissioner when we were notified that after we had he would do nothing until the opinion of the Supreme Court of the United States, and that he would not take the case for final submission until that time.

MR. UNTERMYER: Ruling on what, Mr. Fox?

MR. FOX: When I say "his ruling," his announcement we will put it. Now the counsel has taken this case to the Supreme Court. He has that right and nobody objects or criticises in the slightest. Now, if he is able to obtain from the Supreme Court a decision sustaining his views, it may be accompanied with some qualifications and suggestions from that great Court that will make it necessary for us to introduce other proof, and as the case is not to be decided until that decision, I cannot see how the accused is prejudiced in the slightest degree.

MR. UNTERMYER: I do not think we have had a

definite reply to the suggestion. We want to know whether counsel has submitted his proof. I think we are entitled to have the case closed, or to have a good reason why it is not closed.

THE COMMISSIONER: I understand Mr. Fox to say he considers his case closed unless something he knows not of, occurs.

MR. UNTERMYER: Then, as at present advised, as I understand it, the complainant's case is closed. That being so, Mr. Commissioner, we very respectfully insist that, upon the proof submitted, the offense is not extraditable and we ask you to dismiss the proceeding.

THE COMMISSIONER: The Commissioner again refuses to consider that question until the opinion of the Supreme Court is announced upon the matter now pending before it.

MR. UNTERMYER: Is that on the assumption, even at the expense of appearing persistent, if I may inquire, that the question of the extraditability is going to be determined by the Supreme Court?

THE COMMISSIONER: I do not know that you are justified in making any such assumption from what I have stated. The Commissioner simply states that he wishes such light as the Supreme Court may furnish him by its opinion in the matter submitted to it, before taking this matter up for final action.

MR. UNTERMYER: Then you decline to hear us upon the question of extraditibility at the present time?

THE COMMISSIONER: I do.

MR. UNTERMYER: We except. What else is to be done? We are in rather a quandary. We do not know what is to be done. We are ready and anxious to be heard.

THE COMMISSIONER: If you are desirous of putting in evidence, I suppose I could receive it, although I think it would be much better to wait until a determination of the matter now before the Supreme Court. My understanding was when I directed these gentlemen to proceed, that they were simply to give to you their case so that there would be no time wasted in

the Government making its case, when this matter was determined.

MR. UNTERMYER: I understand the present status of this proceeding to be somewhat as follows: The complainant has closed its case. The defendant wants to be heard upon an application to dismiss the warrant and be discharged, and the Commissioner declines to hear the defendant on that proposition now, or to make any ruling on it at this stage. Of course, until that has been ruled upon, we can go no further.

THE COMMISSIONER: The Commissioner has made a ruling upon it and refuses to receive the case in submission at the present time on the complainant's case.

MR. UNTERMYER: Carrying out that line of action, what does the Commissioner propose to do with the case?

THE COMMISSIONER: Adjourn the case until the Supreme Court has decided the matter now before it.

MR. UNTERMYER: That might be for months. That might carry it over until next Autumn by a division of the Court, and this defendant remain in jail all that time.

THE COMMISSIONER: That is the position your action has placed the defendant in.

MR. UNTERMYER: We certaintly had a right to raise the question by *habeas corpus* and to go to the Supreme Court. Now they have put in another complaint. It is their action that has placed the defendant in that position. They have a man arrested upon a complaint, and when we seek to raise the question of the sufficiency of the complaint before the Courts, they take out another warrant and make another charge. I do not quite see how it is our action. I can quite see how it is theirs.

THE COMMISSIONER: As long as the proceeding is pending in the Supreme Court, the prisoner cannot complain of being restrained in jail by this proceeding. It is the proceeding in Washington, in the Supreme Court, under which he is directly held under arrest.

MR. UNTERMYER: Then, as I understand the posi-

tion, the Commissioner adjourns this proceeding without date.

THE COMMISSIONER: No, I do not. You expect this case to be argued on Monday, I understand.

MR. UNTERMYER: Yes.

THE COMMISSIONER: I think by Wednesday of next week you would have something definite to communicate.

MR. FOX: May I be heard? Do counsel propose to introduce any proof, and I ask that more particularly in the event of the motion to dismiss upon our papers being denied, because I can understand if the motion should be granted it would not be necessary to introduce any.

MR. UNTERMYER: I am afraid at this particular stage of the proceeding we are not able to answer. We have not really conferred, as yet, and reached a conclusion upon that subject.

Now the defendant's counsel ask that the defendant be admitted to bail upon the charge now under examination—namely, under the warrant of March 31, 1903, in such sum as the Commissioner may fix, the defendant being prepared to furnish bail.

THE COMMISSIONER: The Commissioner denies the application, for want of power.

Examination adjourned to Thursday, April 23, 1903, at 2 o'clock P. M.

NEW YORK, April 23, 1903.

Met pursuant to adjournment.

Present:

THE COMMISSIONER,
THE PRISONER,
MR. UNTERMYER, for the prisoner,
MR. FOX, for the demanding government.

Mr. Untermyer states that he is prepared to proceed, as stated at the last session, and asks that the hearing proceed.

The Commissioner rules that as the matter pending in the Supreme Court is in the same condition that it was at the last session, he cannot proceed at present.

Mr. Untermyer renews the application to now proceed with the hearing, on all the grounds that were stated at the last session, which, with the permission of the Commissioner, are deemed to be here repeated and embodied in the record, and he protests against the postponement.

The Commissioner makes the same rulings as appear by the minutes of the last session, and adjourns the proceeding to Tuesday, April 28th, 1902, at 2 o'clock., to which Mr. Untermyer excepts.

Exhibit B.

Affidavit of George Stapylton Barnes, Senior Official Receiver, Verified February 27, 1903.

Filed 10. Mar. 1903. No. 00277 of 1901.

IN THE HIGH COURT OF JUSTICE.

COMPANIES WINDING-UP.

MR. JUSTICE BUCKLEY.

IN THE MATTER OF THE COMPANIES ACTS 1862 TO 1900 AND IN THE MATTER OF THE LONDON AND GLOBE FINANCE CORPORATION LIMITED.

I GEORGE STAPYLTON BARNES, Senior Official Receiver in Company's Liquidation with regard to the application of John Flower hereby report to the Court as follows :—

1. The London and Globe Finance Corporation was

ordered by the Court to be wound up compulsorily on the 30th. October 1901.

2. It thereupon became my duty to make a full enquiry into the past history of the Corporation and report the results of the enquiry to the Court and to the Creditors and Shareholders.

3. Prior to the date of the Winding-up Order I had some indirect knowledge of the affairs of the London and Globe from the fact that Winding-up Orders had been made by the Court in the case of two allied Companies viz.:—The British America Corporation Limited and the Standard Exploration Co. Ltd. the affairs of which were closely interwoven with those of the London and Globe.

4. On the 16th. December 1901 Meetings of the Creditors and Shareholders of the London & Globe were held in accordance with the Act of 1890 when the following persons were nominated and subsequently appointed by the Court to be a Committee of Inspection namely:

Nominated by Creditors:

Dr. Richardson 26, Austin Friars, E. C.
John Flower 1, Angel Court, E. C.
F. C. D. Haggard, 15, Austin Friars, E. C.
Lewis Powell 9, Old Broad Street, E. C.
J. W. Brigstock 5, Austin Friars, E. C.

Nominated by the Shareholders:

	No. of shares held:
F. M. Fells 85, Gracechurch Street, E. C.	212
T. W. Leslie 1, Golden Square, W.	600
T. F. Craven 69, Highbury New Park, N.	1,350

Of the members nominated by the Creditors Dr. Richardson is the Official Assignee of the Stock Exchange and in his official capacity represents defaulting members of the Stock Exchange who are Creditors to the extent of £853,690.18.2. John Flower's Firm of

James Flower & Company are nominally Creditors for £96,564.10.11 but any dividends paid in respect of their claim will be paid to Dr. Richardson for the purpose of distribution amongst the Creditors of the Firm of James Flower & Co.

F. C. D. Haggard's firm of Haggard, Hale & Pixley are in like manner nominally Creditors for £223,360.9.1. but all dividends paid in respect of their claim will in like manner be paid to Dr. Richardson for distribution amongst the Creditors of the firm.

Lewis Powell is not a direct Creditor of the London & Globe at all but is I am informed a Creditor for £3,628.11.3. against the firm of Haggard, Hale & Pixley.

J. W. Brigstock's firm of Read & Brigstock are Creditors for £28,945.10.6.

None of the Shareholders as such have any pecuniary interest in the liquidation.

5. After the Meetings of Creditors and Shareholders I issued the Statutory Summary of the Statement of Affairs and observations covering the whole history of the Company and dealing in detail with the Balance Sheet of the 5th December 1900 I attach a copy of the printed observations issued by me to the Creditors and Shareholders and dated 31st December 1901.

6. In accordance with the provisions of Section 8 of the Companies Winding-up Act 1890 I made and filed with the Court a preliminary Report and a further report dated respectively the 18th. and 19th. December 1901, both of which are on the Court file. In the further Report I expressed the opinion that fraud had been committed in the conduct of the Company's business to which the persons named in the Schedule were parties such persons being Whitaker Wright and H. A. Malcolm and David Anderson the two latter being the principal and Assistant Accountants of the London & Globe Finance Corporation.

7. The further Report came before Mr. Justice WRIGHT for consideration in January, 1902, and he

made an Order for the Public Examination of the persons named in the Schedule to the Report.

8. With regard to the Order for the Public Examination of Malcolm and Anderson an application was made by them to the Judge to have the order set aside. No order was made on that application but the Judge suggested that they should be examined in open Court under Section 115, a course to which Malcolm and Anderson assented. The following persons being Directors or Officers of the Company were also examined under Section 115, namely, Lord Edward Pelham Clinton, Lieut.-Genl. The Honourable Somerset J. Gough-Calthorpe and R. E. Leman, George Worters and D. J. Ford (a member of the firm of Ford, Rhodes & Ford), voluntarily attended to give evidence and were examined. The Public Examination of Whitaker Wright and the examinations of the other persons named above were held on the 13th, 14th, and 20th January and the 11th and 25th of February, 1902.

9. Directly the examinations were concluded a detailed memorandum on the case prepared in the Solicitor's Department of the Board of Trade on materials supplied by me was forwarded by the Board of Trade with all necessary papers to the Director of Public Prosecutions for his consideration.

10. At this time a civil action entitled "London & Globe Finance v. Montgomery" in connection with a large Stock Exchange operation in the shares of the Lake View Consols was pending. This action had been instituted on behalf of the London & Globe by the Voluntary Liquidators prior to the compulsory Winding-up Order and was expected to be heard shortly. The Director of Public Prosecutions after considering the matter decided to defer the question of prosecution until after the hearing of the civil action in order that all possible material for forming an opinion might be before him.

11. Immediately after the hearing of the action all the papers in the matter including my observations

the shorthand notes of the Public Examination and of the other Examinations and the printed shorthand notes of the action in the London & Globe v. Montgomery were submitted by the Director of Public Prosecutions to the Attorney General for his directions and the prosecuting Counsel to the Treasury were instructed to assist the Attorney General.

12. During the summer of 1902 there were many consultations held with the Attorney General and Prosecuting Counsel to the Treasury the Solicitor General also being present I was invited to these consultations in order to give such assistance as I could as to facts and I believe that I was present at all of them. Eventually in July the Attorney General gave directions that the case was not one in which the Public Prosecutor ought to institute criminal proceedings.

13. In the month of November last some Affidavits were forwarded by John Flower to the Director of Public Prosecutions and by him laid before the Attorney General. There was a long consultation (at which I was present) with regard to these affidavits and eventually the Attorney General came to the conclusion that there was no new matter which would justify him in coming to a conclusion different to that arrived at in the previous July.

14. On the 13th February last a Meeting of the Committee of Inspection was held at which the following members were present viz:—John Flower, T. W. Leslie, L. Powell, Dr. H. L. S. Richardson. After considering the pending application of John Flower the following Resolution was passed unanimously by the Members of the Committee present.

> "That in the opinion of this Committee it is
> "desirable that a prosecution be instituted by the
> "Official Receiver and that the costs of the prose-
> "cution be paid out of the assets of the Corpora-
> "tion to such extent as other funds are not avail-
> "able."

The "other funds" referred to in the Resolution are certain moneys which John Flower informed the Committee were in course of collection by him but the amount of which he did not state.

15. Since the meeting I have ascertained the views of the members of the Committee who were not present except F. C. D. Haggard who is travelling in South America, J. W. Brigstock states that he would have voted against the Resolution. T. F. Craven states that he would have voted for the Resolution. The views of J. M. Fells are contained in a letter dated the 21st. February 1903 a copy of which is attached.

16. With regard to the assets of the London & Globe after paying a dividend of 1/- in the £ on Creditors Claims amounting to £1,665,717.10.1 there remains in my hands a balance of £78,872.16.5. Besides the claims of £1,665,717.10.1 referred to above there are claims definitely made but not admitted amounting to £421,188.2.5. There is a further question whether the British America Corporation is not entitled to prove for a sum exceeding £600,000 in addition to all the claims mentioned above. The outstanding assets of the London & Globe will not, in my opinion realize more than £20,000.

17. I have read report of Messrs. Woodthorpe Bevan & Co. and the confirmatory affidavit the report of Messrs. Goodrick Coleman & Co. and the confirmatory affidavit and the affidavit of the applicant John Flower.

The facts and figures in the Report of Messrs. Woodthorpe Bevan & Co. consist almost without exception of facts and figures contained in the observations issued by me in one or other of the allied Companies namely the London & Globe Corporation the British America Corporation and the Standard Exploration Co. I believe that all the facts and figures contained in Messrs. Woodthorpe Bevan & Co.'s report are correct.

18. With regard to the Report of Messrs. Goodrick Coleman & Co. the facts and figures have been care-

fully checked with the result that some errors have been pointed out to Messrs. Goodrick Coleman & Co. They inform me that they intend to file a corrective affidavit before the hearing of this application.

19. With regard to the affidavit of John Flower there is apparently a mistake of about a million in the 7th paragraph. The figure £397,133.6.1 should apparently be £1,397,788.6.1.

With regard to the list of shares quoted in the 7th. paragraph—some of the shares had a value on the date of the Balance Sheet although such shares had no Stock exchange quotation or market value I am not able to give the Court any reliable estimate of such values.

With regard to the other statements in the Affidavit, I do not know of any other errors but there are some facts stated which are outside my knowledge.

G. S. BARNES.

Dated this 27th. day of Febr[illegible]ary, 1903.

Exhibit C.

1, ANGEL COURT,
THROGMORTON STREET,
LONDON, E. C.

FEBRUARY 11th, 1903.

TO THE COMMITTEE AND MEMBERS OF THE STOCK EXCHANGE, AND THE CREDITORS OF THE WHITAKER WRIGHT COMPANIES.

GENTLEMEN, I beg to address you collectively, as your several interests are practically identical, the London Stock Exchange as the leading financial institution of the world being also especially concerned both in upholding the integrity of commercial dealings on behalf of the public, and in protecting its own Members from frauds from without.

In the course of the compulsory liquidations of the London and Globe, the British American, and the Standard Exploration Companies, the Committee of Inspection of the London and Globe became so profoundly impressed with the conviction that it was a proper case for instituting criminal proceedings against the persons answerable for the management of those Companies, that by the courtesy of the Senior Official Receiver in Companies' Liquidation they were permitted to pass the following Resolution :—

> "*Resolved* :—That the falsification of accounts and balance sheet of the London and Globe Finance Corporation, Limited, are of such flagrant character, and have caused such widespread and enormous losses to shareholders and creditors, as to threaten the well-being of the commercial community unless the parties responsible are brought to trial ; this Committee of Inspection therefore respectfully asks the Official Receiver to request the Public Prosecutor, or the proper law officers of the Crown, to take the necessary steps to effect that purpose."

The Resolution was passed unanimously.

As the Law Officers of the Crown have not considered the matter one for a Public Prosecution, it has been determined that it should be undertaken by the sufferers themselves, and a Subscription List has accordingly been opened to provide for an expenditure of £5,000, which will be sufficient for the purpose. The Issue is a simple one—the evidence has already been prepared, and the opinion of Counsel of eminence has been obtained to the effect that a prosecution would be successful.

The circumstances attending the management of the Whitaker Wright Companies and their consequent downfall are too well known to need recapitulation; but the following quotation from the recently issued

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Report of the Inspector General in Companies' Liquidation is instructive :—

> "The value of the gross assets in the Group (of six Companies) is estimated in the Statements of Affairs at £7,299,136; but there is no probability of that figure being even approximately realized. The Assets are of a highly speculative character, and according to the best estimates which can at present be made, their total value is not likely to exceed £1,500,000. This leaves an apparent deficit of £3,500,000, or, if the Vendors' shares be included (and many of these have been placed on the market and sold to the public at prices much beyond their nominal amount) of £7,500,000."

Besides this loss of capital, the debts of the Globe alone amount to close upon two Millions, the greater part of which has fallen on Members of the Stock Exchange, who, no doubt, in common with my own Firm, were induced to give credit to the Company on the faith of its Balance Sheets being true and correct. It is not on account of these losses, however, that I base my appeal to you to make up the comparatively small sum of £5,000 required to carry on the prosecution. It is on the far higher ground of the national welfare, which depends upon upholding the past record of the Empire for its business integrity and commercial morality. Without the protection afforded by reliable balance sheets, the confidence of the investor in Joint Stock Companies will not exist, and business in the Stock Exchange will immeasurably suffer. It would be impossible to exaggerate the importance of these vital considerations to the community at large, and in asking the Stock Exchange to give me the support I desire, either collectively as a body, or by individual guarantee, I am convinced I shall not do so in vain.

Any balance remaining in hand after the conclusion of the Prosecution will be refunded to contributors

pro rata, and proper accounts will be kept for the inspection of Contributors at any time.

I beg to enclose a Subscription Form, which should be filled up and remitted to the London and Westminster Bank, Limited, Lothbury, London, E. C., with the amount of your contribution, as soon as possible; or if preferred may be forwarded to me,

JOHN FLOWER,
Chairman of the Committee, London and Globe Prosecution Fund.

Member of Committees of Inspection—
London and Globe.
British American Corporation.
Standard Exploration Company.

THE LONDON & GLOBE FINANCE CORPORATION.

LIMITED.

IN LIQUIDATION.

TO THE COMMITTEE OF THE LONDON AND GLOBE PROSECUTION FUND, 31 WOOL EXCHANGE, COLEMAN STREET, LONDON, E. C.

I enclose {Cheque / postal order / stamp} for £

being my contribution as a (Creditor / Shareholder) towards the above Fund, and on the express terms that I do not thereby incur any liability whatsoever beyond the amount of this contribution.

Signature .....
Name of (Creditor / Shareholder) in full .....
Address .....
Description .....
Amount of Debt .....
Number of Shares in Company (if any) held .....
Date .....

3641

BANKERS' RECEIPT.

(To be detached by the Bankers.)

RECEIVED of Mr. ..... the sum of £..... as his contribution towards the LONDON AND GLOBE PROSECUTION FUND.
Dated the.....day of ....., 190...

THE LONDON AND WESTMINSTER BANK, LIMITED.

..... STAMP. .....
Cashier.

£ : :

This form to be sent entire with the amount of contribution to tne London and Westminster Bank, Ltd., Lothbury, London, E. C.

N. B.—The Committee would be greatly obliged if Shareholders would, in order to facilitate the collection of further information, fill up the following Schedule with as much detail as possible :

Questions.	Answers.
Did you receive the London and Globe balance-sheet for the period ending 5th December, 1900.	
Were you in any and if so in what way thereby deceived or defrauded.	
Were you thereby induced to become a Shareholder or to acquire further shares in the London and Globe Co., and if so to what extent.	
Were you thereby induced to entrust or advance any property or money to the London and Globe Co., or to give credit to it or to enter into any security for its benefit, if so give full particulars.	
Were you thereby induced to abstain from selling any of the Shares which you held in the Company.	

Signature.....

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FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 27 1903
JAMES H. McKENNEY,
Clerk.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Counsel for Appellant.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, Appellant, vs. WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.* Appellees.	No. 661.

APPELLANT'S BRIEF.

This is an appeal from an order of the United States Circuit Court, Southern District of New York, dismissing writs of *habeas corpus* and *certiorari* issued on the petition of the appellant, and denying his application for release on bail on the ground that there was no power or jurisdiction in the Court to admit him to bail and remanding him to the custody of the United States Marshal for the Southern District of New York (Rec., p. 13).

The petition on which the writs of *habeas corpus* and *certiorari* were issued alleged that the appellant is a citizen of the United States, and was imprisoned and restrained of his liberty in the county jail of the County of New York in the custody of William Henkel, Marshal of the United States for the Southern District of New York, by virtue of a warrant dated

March 16th, 1903, issued by Thomas Alexander, United States Commissioner (Rec., p. 1).

The warrant charged that the appellant

" did heretofore, during the month of October, in the " year 1899, and in the month of December, 1900, in the " City of London, in that part of the United Kingdom " of Great Britain and Ireland called England, and " within the jurisdiction of His said Britannic Majesty, " commit the crime of fraud as the director of a com- " pany—to wit, did heretofore and in the month of " October, in the year 1899, and in the month of De- " cember, 1900, at the City of London aforesaid, then " being a director of a certain body corporate—to wit, " the London and Globe Finance Corporation, Lim- " ited, unlawfully make, circulate and publish certain " reports and statements of accounts of the said cor- " poration which were false; the said Whitaker " Wright then well knowing the said reports and state- " ments to be false, with intent thereby to deceive and " defraud the shareholders or members of the said " corporation " (Rec., p. 3).

This warrant was issued on the complaint, on oath, of Sir Percy Sanderson, His Britannic Majesty's Consul General at the Port of New York, which alleged in the language of the warrant, that the appellant had committed the crime of fraud as a director, and that the appellant was a fugitive from the justice of the Kingdom of Great Britain and Ireland and was then within the territory of the United States, and

" that the crime of which the said Whitaker " Wright has so as aforesaid been guilty is an offense " within the treaty between the United States and " Great Britain " (Rec., p. 4).

The petition further alleges that the complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for his detention; that it does not state any facts which show that the appellant has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland; that he duly objected to

the continuance of any proceedings under the aforesaid complaint and warrant before the said United States Commissioner, on the ground that the said Commissioner had no authority or jurisdiction to proceed therewith on the grounds aforesaid or under any provision of the Constitution or laws of the United States or any treaty of the United States with any foreign country, and that said objections were overruled by the said Commissioner (Rec., p. 1).

Appellant also further alleged that on the 18th day of March, 1903, he presented to the United States Commissioner an application to be admitted to bail pending the proceedings, and in support of his application filed with the Commissioner the affidavit of his attending physician, which showed that the was then suffering from an acute attack of bronchitis, and that his illness was greatly aggravated by his imprisonment and that it might develop into pneumonia (Rec., pp. 1, 5).

The application of the appellant to be admitted to bail was denied on the ground that no authority existed therefor, in spite of the fact that an application was made by the representative of the demanding government for an adjournment of the proceedings until March 30th, 1903, which was granted, and of the statement made by such representative that further adjournments would in all likelihood be thereafter applied for (Rec., p. 2).

The appellant charges

" that his imprisonment and detention are illegal; " that the warrant is wholly void; that the complaint " charges no jurisdictional facts to warrant his im- " prisonment and detention; that the denial to him of " the right to give bail constitutes a violation of the " Eighth Amendment of the Constitution of the United " States and Section 1015 of the United States Revised " Statutes and of the common law of the United States " of America, and constitutes a deprivation of his lib- " erty without due process of law " (Rec., p. 2).

Commissioner Alexander made a return to the writ of *certiorari* which was issued on this petition, setting

forth the proceedings taken before him as above stated (Rec., pp. 6–11), and the appellee made a similar return (Rec., p. 6).

Both writs were dismissed at a term of the Circuit Court held by Judge LACOMBE, who certified

" that upon the hearing of the cause the construc-
" tion and application of the treaties between the
" United States of America and the United Kingdom
" of Great Britain and Ireland with regard to extradi-
" tion was fairly raised by the petition for writs of
" *habeas corpus* and *certiorari*, and was argued on the
" hearing of the same and was determined by the
" Court, and that upon such hearing the power and
" jurisdiction of the United States Circuit Court under
" said treaties and under the United States Revised
" Statutes and the Constitution of the United States of
" America to admit the petitioner to bail pending an
" examination into his alleged criminality, was fairly
" raised by said petition, and was argued upon the
" hearing and was determined by the Court " (Rec., p. 14).

The demanding government claims that the crime charged against the appellant is extraditable under the provisions of Subdivision 4 of Article I. of the extradition treaty of 1889, which refers to

" fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any country, *made criminal by the laws of both countries.*"

It is claimed that by the act XXIV and XXV Victoria, chapter 96, section 84, the offense charged against the appellant is made criminal. The section reads :

84. Whosever, being a director, manager or public officer of any body corporate or public company shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security

for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

The last antecedent section which refers to any penalty is Section 75, which provides that a person committing the offense

"shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

To bring the case within the language of the treaty, the demanding government also claims that this offense is made criminal by the provisions of subdivision 3 of Section 611 of the Penal Code of New York, which reads as follows:

"SECTION 611. *Misconduct of Officers and Employees of Corporations.* A director, officer, agent or employee of any corporation or joint stock association who * * * (3) knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false * * * is guilty of a misdemeanor."

By Section 15 of the Penal Code, it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in the penitentiary or county jail for not more than one year or by a fine of not more than five hundred dollars, or by both."

Assignments of Error.

The appellant has made and filed the following assignments of error (Rec., pp. 17, 18) :

FIRST. In dismissing the writs of *habeas corpus* and *certiorari* and remanding the petitioner.

SECOND. In holding that the petitioner is lawfully held in custody.

THIRD. In holding that the crime charged against the petitioner is one which is extraditable within the provisions of Article 1, subdivision 4, of the extradition treaty of 1889 between the United States of America and the United Kingdom of Great Britain and Ireland.

"FOURTH. In holding that the crime charged against the petitioner is one which is made criminal by the laws of both the United States of America and the United Kingdom of Great Britain and Ireland.

"FIFTH. In holding that the crime charged against the petitioner, to wit, the commission of fraud by a director of a company, is made criminal by the general laws of the United States as distinguished from the local legislation of some of the particular States of the Union.

"SIXTH. In holding that it is sufficient to make fraud by a director extraditable if by the law of the State of New York, where the petitioner was arrested, such act is made criminal, irrespective of the question as to whether or not it is made criminal by the general law of the United States.

"SEVENTH. In holding that by sub-division 3 of Section 611 of the Penal Code of the State of New York there was prescribed a crime which is the equivalent of the crime charged in the complaint and warrant on which the petitioner was arrested to have been committed by him in England.

"EIGHTH. In holding that the crimes described in XXIV. and XXV. Victoria, Chapter 96, Section 84, and in subdivision 3 of Section 611 of the Penal Code of New York, were the equivalent of each other.

"NINTH. In holding that no power or jurisdiction exists to admit your petitioner to bail pending the examination into his alleged criminality.

TENTH. In holding that the United States Circuit Court has no inherent power to admit the petitioner to

bail during the pendency of the extradition proceedings against him.

ELEVENTH. In holding that the provisions of the extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland, or the acts of Congress regulating such proceedings, contain any prohibition against the admission of the petitioner to bail pending such proceedings.

TWELFTH. In holding that Section 1015 of the United States Revised Statutes does not entitle the petitioner to be admitted to bail pending said extradition proceedings.

The record thus presents two important questions for review:

(1) As to whether or not the complaint and warrant on which the appellant is detained in custody charge an extraditable offence within the meaning of the extradition treaties existing between the United States of America and the United Kingdom of Great Britain and Ireland.

(2) As to whether or not the Court below had the power and jurisdiction to admit the appellant to bail pending the extradition proceedings which had been instituted against him.

The appellee claims and Mr. Justice LACOMBE has decided:

1. That the act is extraditable under the clause of the treaty under consideration requiring that the fraud of a director must be such as is "*made criminal by "the laws of both countries,*" if it is criminal where committed and in the particular State or Territory of this country in which the accused happens to be apprehended, although not criminal under Federal law or by the general body of statute law of the several States, or in any State or Territory other than that in

which he is arrested. The words "made criminal by "THE LAWS of the *country*" are held to mean the law of the place of arrest, though that may be in conflict with the laws throughout the country.

2. That because of the absence of an affirmative provision for bail in the treaty, although there is no prohibition to be found there or elsewhere in our laws, the Court is without power to allow bail pending investigation into the extraditability of the offence, and this notwithstanding the rulings of the English Courts allowing bail in like cases.

The appellant contends:

1. That, under the most liberal construction of the clause in question, the offense must be criminal either *(a)* under the common law, or *(b)* by the Federal statutes, or *(c)* by the preponderance of the statute laws of the States, to such an extent that the act may fairly be said to be made criminal by "the *laws* of "both *countries*."

2. That the law of the State in which the accused happens to be apprehended has no relation to the question.

3. That the mere omission in the treaty of an express provision for bail was in accordance with the customary form, and was in no sense an implied prohibition against the power of the Court to allow bail.

4. That the Circuit Court has the inherent power to allow bail in extradition proceedings, especially under a treaty which the Courts of the demanding government have construed as entitling them to allow bail. Treaties are intended to grant reciprocal rights and impose reciprocal duties.

POINTS.

I.

The crime charged against the appellant is not one which is "made criminal by the laws of both countries," to wit, the United States of America and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the extradition treaties between those governments.

"Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision *(1 Moore on Extradition, 21; United States v. Rauscher, 119 U. S., 407")*.

Chief-Justice FULLER in *Terlinden vs. Ames, 184 U. S., 270, 289 :*

The Extradition Treaties.

The provisions relating to extradition, contained in the treaty of 1842, known as the Webster-Ashburton Treaty, are contained in Article X., which reads as follows :

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either, shall seek an asylum or shall be found, within the territories

of the other ; Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed ; And the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered ; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining Judge or Magistrate to certify the same to the proper Executive Authority that a warrant may issue for the surrender of such fugitive.—The expense of such apprehension and delivery shall be borne and defrayed by the Party who makes the requisition, and receives the fugitive."

By the supplemental treaty of 1889, negotiated between Great Britain and the United States of America through their representatives, Sir Julian Pauncefote and James G. Blaine, Secretary of State, and proclaimed in March, 1890, additional crimes were added to those provided for in Article X., as follows:

"ARTICLE I.

"The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

"1. Manslaughter when voluntary.

"2. Counterfeiting or altering money ; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement ; larceny ; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, *made criminal by the laws of both countries.*

"5. Perjury, or subornation of perjury.

"6. Rape ; abduction ; child-stealing ; kidnapping.

"7. Burglary ; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas with intent to do grevious bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."

It is attempted to bring the present case under subdivision four of the supplemental treaty, which specifies:

"Fraud by a * * * director * * * of any company, *made criminal by the laws of both countries.*"

A phrase substantially the same as that just italicized is to be found in subdivision ten of Article I., which reads:

"Crimes and offenses against the *laws of both countries* for the suppression of slavery and slave-trading."

[Congress has passed numerous statutes for the suppression of slave-trading (*U. S. R. S.*, §§ *5375*, *5382*, *5524*, *5525*).]

It is also contained in the last clause of the article with respect to participation in any of the crimes mentioned in the treaty, provided such participation be punishable *by the laws of both countries.*

The language of this treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatories of the treaty have expressly created. As is said by Mr. Justice BROWN in *Tucker vs. Alexandroff*, *183 U. S.*, *436*:

"But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia,

having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. As observed by LORD DENHAM in Aspdin vs. Austin, 5 Ad. & Al. N. S., 671, 684, 'where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.' The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius.*"

Doe vs. Braden, 16 How. (U. S.), 657.

What then is meant by the phrase "made criminal by the laws of both countries?" The only countries or governments referred to in the treaty are the United States of America and the United Kingdom of Great Britain and Ireland.

It could not have been contemplated that any single State or Territory composing the United States of America was referred to as one of the countries which concluded the extradition convention. The subject of extradition is one of international cognizance, beyond the purview of State sovereignty; one over which the States composing the American Union have no more jurisdiction than have Ireland, Scotland or Wales.

Thus in *People ex rel. Barlow vs. Curtis, 50 N. Y., 321,* it was decided that by the Constitution of the United States the whole subject of foreign intercourse was committed to the Federal government, and in all questions relating thereto it alone can speak and act. It has the exclusive power to regulate, provide for and

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control the surrender of fugitives from justice from foreign countries. Consequently the provision of the United States Revised Statutes providing for such surrender was held to be unconstitutional. In the course of his opinion Chief Justice CHURCH said:

"The whole subject of foreign intercourse is committed to the federal government. Indeed, this was one of the principal purposes of the Union. As to foreign countries, the states, as such, are unknown. The treaty making power is exclusive in the general government not only, but the states are prohibited from exercising it in express terms. * * * If one state may, all the states may make these arrangements, which arrangements may all differ from each other; and the same states may make different arrangements with each foreign nation. The embarrassment which such an exercise of power by the states would produce to the general government in its foreign policy is obvious."

This decision was cited with approval in the *Rauscher Case, 119 U. S., 414.*

Definitions of the Word "Country."

The word "country" has been defined in the Standard Dictionary as follows:

"1. A land under a particular sovereignty or government, inhabited by a certain people or within certain definite geographical limits.

"2. A particular nation or the institutions peculiar to it; by implication or qualification, the land of one's nativity or allegiance."

Webster's Dictionary defines the word "country" as "The terrtory of an independent nation."

When one speaks colloquially of "this country," the United States is meant.

Daniel Webster in the address delivered at the laying of the corner-stone of the Bunker Hill Monument said:

"In pursuing the great objects which our condition points out to us, let us act under a settled conviction,

and an habitual feeling that *these twenty four States are one country.*"

The word "country" has received judicial interpretation from our courts.

Thus, in *Stairs et al. vs. Peaslee, 18 Howard, 521, 526*, Chief Justice TANEY said:

"As regards the second point certified, the word 'country' in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control. The question was brought before the treasury department in 1817; and, on the 29th of September in that year, instructions were issued by the department, in a circular addressed to the different collectors, in which the construction above stated is given to the word. The practice of the government has ever since conformed to this construction, and it must be presumed that congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.

"Apart, however, from this consideration, we regard the construction of the treasury department as the true one. Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged. For, if the word 'country' were used in that sense, the law furnishes no certain and fixed limits to guide the appraisers in determining what are its principal markets; and it would often be difficult to decide whether the market selected by appraisers, to regulate the value, was actually within the limits of the country from which the exportation was made. And, moreover, if the construction contended for by the plaintiff could be maintained, it would soon be found that goods would not generally be exported directly to the United States from the principal market where they were procured, but sent to some other place where they were not in demand, to be shipped to this country and invoiced far below their real value. The case before us shows what may be done to evade the payment of the just amount of duty, and neither the words of any revenue law, nor any policy of the government, would justify a construction alike injurious to the public and to the fair and honest importer.

"It follows, therefore, as the cutch in question was

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shipped and invoiced from Halifax, that it was the duty of the appraisers to estimate and appraise it according to its value in the principal markets of the British dominions. What markets within these dominions were the principal ones for an article of this description was a question of fact, not of law, and to be decided by the appraisers, and not by the court. They, it appears, determined that London and Liverpool were the principal markets in Great Britain for the goods in question, and appraised the cutch according to its value in these markets. And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the government."

In *United States vs. The Recorder, 1 Blatchf., 27 Fed. Cas., 718, 720,* District Judge BETTS said:

"It seems to be maintained on the part of the United States, that the act should be understood to restrict the importation by British vessels, to articles, the production or manufacture of her European possessions, and to compel the productions and manufactures of her dependencies out of Europe, to be brought here in vessels belonging to the place of production or manufacture. This construction is founded upon the assumed import of the term 'country,' employed in the act, in connection with the supposed policy of the statute to establish a condition of reciprocity in respect to the navigation and trade of the country, where that was not already regulated by the convention of July 3, 1815.

"It may be admitted that the term 'country,' used in the act, in its primary meaning, signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word 'country' is employed to denote the population, the nation, the state, the government, having possession and dominion over the country.

* * * * * *

"Vattel says:

"The whole of a country possessed by a nation and subject to its laws, forms its territories, and it is the

common country of all the individuals of the nation (*Id.*, Bk. 1, c. 19, §211).

"It is very apparent upon the provisions of the act of 1817 that congress understood and used the term 'country' in the enlarged sense given by Vattel. Thus 'nation,' in the proviso to section 1, 'foreign prince or state,' in section 3, and 'foreign power,' in section 4, all represent, in their connection, the same idea as 'country,' in the first section. The special designation of 'citizens or subjects' does not mark with more precision that the law had reference to political powers and agencies than does the mere word 'country,'—the thing containing, being, by a familiar form of speech, used for that which it contains; and, besides, persons could, with no propriety of language, be styled 'citizens or subjects of a country,' without understanding 'country' to mean the state or nation and not merely a section or portion of territory belonging to the nation. So, in the preamble to the convention of 1815, 'countries,' 'territories' and 'people' are used by the two governments as having one import, and in the first article 'territories' is employed as the correlative 'inhabitants.' Other instances are frequent in our statutes and treaties and diplomatic correspondence, in which foreign countries and territories are referred to as the people, state or nation, occupying and governing them.

"But, in the present case, it seems to us that the phraseology of the first section of the act indicates more distinctly even than the use of the ordinary word 'country' that the regulation had a view to foreign governments and nations and their vessels, and not to the localities within which the individual owners might reside or where the vessels might be employed. The expression of the law is: 'In such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production or manufacture.'"

The Windsor Case.

The meaning of this phrase, with reference to extradition between this country and Great Britain, is illuminated by the decision of the Court of Queen's Bench in *Re Windsor, 6 Best & Smith, 522–530*, de-

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cided in 1865 by a court composed of Lord COCKBURN, Mr. Justice BLACKBURN and Mr. Justice SHEE.

That case arose under the Extradition Treaty of 1842 between Great Britain and the United States, and the Extradition Act, VI. and VII. Victoria, C. 76, passed for the purpose of carrying the treaty into effect. The prisoner was arrested on the charge of forgery, committed while a paying teller of the Mercantile Bank of New York, the crime consisting in making fraudulent entries on the books of the bank. Under the Revised Statutes of New York as then in force such false entry constituted the crime of forgery.

Although the Extradition Treaty merely used the word "forgery," without qualification, it was nevertheless held that this must be understood to mean such acts as amount to forgery according to the law of England *and the general law of the United States and that it did not comprise offenses which are only such by the local legislation of some particular State of the American Union.*

The case was argued by able counsel and the opinions are so much in point that they are quoted in full for two reasons, (1) because the phrase "both countries," which is to be found in the treaty of 1889, is used by the Court, not with reference to any fractional part of the United States or of Great Britain, but with reference to both governments; and (2) because they show that the local law of New York, or of any other State of the United States, is not treated by the Courts of Great Britain as the law of *this* country.

LORD COCKBURN said: "We are here called on to put a construction on a statute relating to the extradition of criminals having committed offenses within the jurisdiction of the United States of America, who are found in this country, and whose surrender is demanded by the American government. Among the offenses to which the statute applies, 'forgery' is specified. In this particular instance it is sought to obtain the discharge of the American citizen now in custody; it appears that he was guilty of making a false entry in a book kept by a money corporation of

New York, in which it was his duty to keep an account of the moneys received by him as officer of the corporation, and how they were disposed of. No doubt this was a false entry, and made for fraudulent purposes. But it is clear, for the reasons given by the members of the Court during the argument, that the offense in question did not amount to 'forgery.' *And, there being nothing to show the contrary, the same must be taken to be the law of the United States, which corresponds in general with that of this country.* What was done in this case would therefore no more be a forgery in America than here; and it is only by an act of the local legislature of New York that it is made one. The question we have to determine is, whether this is enough to bring the case within The Extradition Act, 6 & 7 Vict. c. 76, and call on the government of this country to deliver up this man. I think not. The true construction of the statute is, that its terms, specifying the offenses for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of *both countries.* And where a part only of one of the two nations thinks proper to make certain acts an offense which do not fall within that offense as known to the general law of both, it will not be sufficient to bring a case within the statute.

"We ought to interpret the statute according to the intention of both parties, and it would be going far to assume that before passing it the legislature of this country went into an elaborate inquiry as to what by the law of every state of the American Union amounted to forgery, and made this statute with the intention to include each of them within its operation. I believe that in point of fact that was not done, and we ought not to assume that it was. We must assume that the terms used by the parties speaking the same language and with laws so like, used them in the sense which they bear in our own law and in the law of the United States, *and not in that which they have in any particular state of the Union.* The applicant, therefore, ought not to be surrendered. He is also in custody under civil process, but we have nothing to do with that at present."

Mr. Justice BLACKBURN said:

"I am of the same opinion. We have only power to surrender under statute 6 & 7 Vict. c. 76, which

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does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. The charge against the applicant is, that being a clerk in a bank he did embezzle or steal a large sum of its money —that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing. Here this man has not made any false statement purporting to be on behalf of any other person, but a statement purporting to be what it is. It is true that the statute of New York says that such conduct shall be deemed forgery in the third degree ; and observations have been made to show that the act done here was not within that statute. I am inclined however to think it was ; but then does the New York statute saying this make him guilty of forgery within the meaning of The Extradition Act? Two very high contracting parties make a treaty on which The Extradition Act is founded; but we must construe that treaty according to the words used by them when fairly understood, especially when we find both peoples speaking the same language. Forgery is one of the crimes specified, and that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery. "Piracy" is another, which means offences committed on the high seas, and is so understood by both. But I do not think, if either country were to say that some crime committed on land should be piracy, this would come within the treaty. The meaning of the New York statute is the party shall be punished as if for forgery. I, therefore, agree with the Lord Chief Justice."

Mr. Justice SHEE concurred in both opinions.

Twenty-four years after this case was decided the treaty of 1889 was negotiated, and it must be assumed that the high contracting parties had before them these opinions rendered in the *Windsor case* in which stress was laid on the fact that, in order to admit of extradition, even where there was no special

qualification in the language of the treaty, it was necessary that the offense should be one made criminal by the general law of the United States and not merely by the law of one or more States of the Union.

In the language of Lord COCKBURN: "Where a part "only of one of the two nations thinks proper to make "certain acts an offence which do not fall within that "offence as known to the general law of both, it will "not be sufficient to bring a case within the statute."

Hence, when in three different instances in Article I the Treaty of 1889, the phrase "made criminal by the laws of both countries," or some equivalent phrase was used with respect to offenses purely statutory, it is clear that it was intended that it should be read in the light of the *Windsor case*, and that it did not suffice to create a case under the treaty to show that the statutes of one or more of the States of the Union recognized such a crime as the fraud of a director. In other words, it was necessary that the legislation of Congress or the general legislation of the States of the Union should create such a crime.

So far as murder, perjury, rape, burglary, piracy, larceny, arson, robbery and a number of other enumerated crimes are concerned, they are all common law offences in the several States, and, independently of statute, are made criminal throughout the United States.

It is well known, however, that in addition to these common law offences, there are numerous statutory offences. It is with respect to them, and particularly with regard to fraud of directors and similar fiduciary officers, that it was expressly stipulated that in order to make the offense extraditable it would have to be made criminal not only by the law of Great Britain, but also by the general law of this country.

It is claimed by the appellee that the decision in *Re Arton (No. 2) L. R. Q. B. D. (1896) 509*, lays down a rule opposed to the decision in the *Windsor case;* but on examination it will be found to sustain that principle.

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There, the prisoner was arrested on the charge of having committed in France a crime described as "*faux en ecriture de commerce.*" The treaty was both in English and French. The English version contained a description of an offense which was made criminal by the Larceny Act of 1861. The French text described a crime made criminal by the Penal Code of France, using language which was not a translation of the English text but which nevertheless described an offense practically identical. Hence, it was decided that the case came within the extradition treaty and the English extradition acts.

Lord RUSSELL of Killowen concluded his opinion with the following significant language:

"The English and French texts of the treaty are not translations of one another. They are different versions, but versions which on the whole are in substantial agreement. We are dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold we do, that such a crime *is a crime against the law of both countries*, and is in substance to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition."

The manifest inference is, that if the crime charged against a prisoner is not a crime against the law of the demanding and of the detaining government, there is no basis for the claim of extradition.

The decision in the *Windsor case* was followed and applied in an elaborate opinion by Mr. Justice CARON *in re John C. Eno, 10 Quebec, L. R., 194.*

Eno was the president of the Second National Bank of New York and was indicted for forgery in having made false entries on the books of the bank. He fled to Canada, and on being arrested applied for a writ of *habeas corpus* and was discharged, solely because the crime which he had committed in New York did not constitute the crime of forgery under the laws of Great Britain which were in force in the province of Quebec.

The Court also relied on the decision in *Re Lami-*

rand, 10 Jur., 290, and in *Re Tully, 20 Fed. Rep., 812.*

In the case last cited, which arose in the Circuit Court for the Southern District of New York, Judge BROWN cited and followed the *Windsor Case* and discharged the prisoner.

Judge LACOMBE ignored these authorities, for he said in his opinion (Rec., p. 11) :

> " When by the law of England and by the law of the state in which the fugitive is found the fraudulent acts which it is charged he has committed are made criminal, he is fairly within the treaty; a statute of a state is, broadly speaking, 'a law of this country' as contradistinguished from a 'law of Great Britain.' "

If there were no general statute on this subject in Great Britian, but only a local law in one of its Colonies, or in the Duchy of Cornwall or Lancaster alone, would extradition be possible for such an offense even though it was made criminal by the laws of this country?

It might with equal force have been said in the Windsor case and in the Eno case, that the forgery statute of New York was a law of the United States of America as contradistinguished from " a law of Great Britain "; and yet the courts which decided those cases were of a different opinion, and concluded that a part could not be equal to the whole, and that one of the States of the Union did not constitute this country.

Inasmuch as extradition treaties are based on considerations of reciprocity there is no reason why our courts should take a different view of the treaty under consideration than was taken by the courts of Great Britain.

Moreover, the language of the treaty is not, " made criminal by *a law* of both countries," but its language is, " made criminal by *the laws* of both countries." Hence, the case is not determined by saying that a statute of a State is, broadly speaking, " a law of this country." It is necessary to ascertain what is *the* law of this country.

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The appellee would have the Treaty read:

"Fraud by a director made criminal by the law of "the country where the offense was committed and "by the law of the State, Territory or District where "the offender is apprehended."

According to the contention of Judge LACOMBE, a statute of Oklahoma would be the law of this country for the purposes of extradition.

Appellees' counsel lays stress on the language of the treaty of 1842, which provides that the surrender of one arrested on the requisition of a demanding government shall only proceed "upon such evidence of criminality, as according to the *laws of the place* where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial *if the crime or offense had been there committed.*"

This clause does not assume to define any crime or to specify any ground for extradition, or to enlarge the class of crimes enumerated in the treaty, or to make any declaration as to the substantive law. It merely regulates procedure. It enacts that assuming that the offense charged is extraditable that the fact of the criminality is to be established in accordance with the rules of evidence which would be applicable had the offense charged been in fact committed at the place where the arrest has taken place.

The right to extradite and the rules of evidence to establish the crime are not convertible propositions.

Appellees' counsel has cited *Matter of Farez, 7 Blatchf., 345; In re Wadge, 15 Fed. Rep., 864,* and *In re Charleston, 34 Fed. Rep., 531.* We fail to recognize their applicability.

The first of these cases arose under the Treaty with Switzerland, which did not contain language in anywise resembling that of the Treaty now under discussion. It permitted the extradition of persons charged with crimes specified "when these crimes are subject to infamous punishment." There was no qualification to the effect that the punishment should be made in-

famous "by the laws of both countries." Judge BLATCHFORD accordingly said:

"My interpretation of this provision is that when one of the specified crimes has been committed and the extradition of the person who has committed it is demanded, it is sufficient if such a crime is subject to infamous punishment in the country where it was committed, without its being necessary that it should also be subject to infamous punishment in the country from which the extradition of such person is demanded."

This Treaty also contains a proviso as to proof of criminality similar to that found in the Treaty with Great Britain, except that the word "country" occurs instead of "place." We are, however, unable to find in the opinion the commentary to be found in appellees' brief.

The *Wadge* and *Charleston cases* merely relate to matters of procedure and not to the subject of extraditablility.

U. S. R. S., § 5209.

Although on the argument in the Court below the appellee conceded that there was no federal legislation of a general character making the fraud of a director criminal, which is the equivalent of the English statute under which the appellant is sought to be prosecuted, the appellee now contends that Section 5209 of the United States Revised Statutes is an equivalent provision, and brings the case within the qualifying clause of the treaty.

That section, which is found in Title 62, relating to National Banks, and to no other kind of corporation or association, reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit,

draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The crime charged in the complaint and warrant in this case is that of making, circulating and publishing certain reports and statements of accounts of the London and Globe Finance Corporation, Limited, which were false (Rec., p. 3).

Section 5209 of the Revised Statutes describes an entirely different offense from that defined by Section 84 of the English Larceny Act, the language of which is used *verbatim* in the complaint and warrant.

The clause of Section 5209 on which the appellee relies is that which relates to the making of a false entry in any book, report or statement of the association. No such crime is charged against the appellant.

Furthermore, it is not pretended that the London and Globe Finance Corporation is a National Bank, or a bank of any description. Section 5209 can have no application to a corporation of any class other than that to which it expressly relates—namely, a National Bank.

The laws regulating national banks and the acts of their directors that are made offenses have no counterpart in any other branch of our law. There are special reasons why the reports of such institutions should be safeguarded that do not apply to other corporations. In all the states a distinct body of offenses is created with respect to directors of banks that are not found in the laws pertaining to other corporations.

There are many other classes of corporations with

respect to which Congress has the power to legislate or has undertaken to legislate even to the extent of creating certain offenses of directors arising out of their acts or omissions.

Illustrations of such legislation are the Sherman Anti-Trust Law, Interstate Commerce Act, and the new Department of Commerce and Rebate laws. They apply to and regulate the duties and internal affairs of every corporation engaged in interstate commerce without reference to the fact of whether or not the particular regulation refers to or in any way affects their interstate business.

The insertion in the bill establishing the Department of Corporations of a provision making criminal a false report by a director of a corporation engaged in interstate commerce would have been quite as much within the power of Congress and fully as germane to the subject matter as any of the many other regulations and penal provisions therein contained affecting the duties and liabilities of directors if it had been the policy of Congress to create such offenses. The act complained of here might have been "made criminal by the laws of this country" within the literal meaning of the phrase so far as concerned corporations engaged in interstate commerce if Congress had so chosen.

Its legislation with respect to directors of national banks and its failure to enact like legislation affecting directors of other corporations over which it had like control whilst creating other penal offenses connected with their offices, is another evidence that the national policy in dealing with directors is in harmony with the laws of the majority of the states on the subject.

Section 84 of the Larceny Act has reference to "any body corporate or public company." The Act of Congress does not apply to "any" corporation, but to a single class and no more; and that class does not include a corporation of the character of the London and Globe Finance Corporation.

A treaty must of necessity refer to general and not

to special legislation. The fraud of a director which is intended to be reached is not that of a director of a corporation belonging to a particular class, as, for example, an irrigation company, or a social club.

N. Y. Penal Code, Section 611.

The appellee principally relies upon the fact that the appellant was arrested within the boundaries of the State of New York, and that the Penal Code of that State provides that

"a director of any corporation who knowingly concurs "in making or publishing any written report, exhibit "or statement of its affairs or pecuniary condition, "containing any material statement wich is false, is "guilty of a misdemeanor."

A comparison between this language and that of Section 84 of the English Larceny Act, discloses that the New York act, in its caption, refers merely to the misconduct of a director, and in its substantive provision makes no reference to the "fraud" of a director. "Fraud" is not an essential element of the offence which it defines. There is no allusion to "fraud." The intent to deceive or defraud is not an element of the offence created.

While the English statute makes the "fraud" of a director of a company criminal, the New York statute does not refer to the fraud of a director, and, therefore, has no provision which is the equivalent of the English statute.

If a resident of New York had violated subdivision 3 of Section 611 of the New York Penal Code, and had fled to England, his act would not be the fraud of a director within the language of the treaty, under the principle laid down in the Windsor case, and he would not be extraditable to this country. His offence, though made criminal by the laws of New York, is not made criminal by the general law of the United States or by the English law, and is not the criminal act, described as "*fraud* by a director."

The Legislation of the States and Territories with Regard to Crimes of Corporate Directors.

We have made a thorough examination of the statutes of the various States and Territories of the Union with a view of ascertaining what legislation there is which bears any relation to the acts of a director in their criminal aspects. The result of such investigation is to be found in the Appendix, which contains every statute that we have been able to find which deals with the subject, whether it be the equivalent of the English statute or not. It will be found from the following summary of these statutes *that in the majority of the States and Territories there is no provision whatever*, and that in most of the instances where crimes committed by directors of corporations are defined the offense is materially different from that described in Section 84 of the English Larceny Act.

Summary of Laws.

1. In twenty-four States and Territories of the Union (21 States and 3 Territories) there *is no statute whatever* corresponding either with the English Act or with Section 611 of the New York Penal Code. These States and Territories, in which there is no law making the act here charged criminal and in which it is *not* criminal, are as follows:

Colorado,
Connecticut,
Delaware,
Georgia,
Illinois,
Indiana,
Maine,
Missouri,
Mississippi,
Michigan,
Nevada,
North Carolina,
Ohio,
Rhode Island,
Texas,
Vermont,
Virginia,
Washington,
West Virginia,
Wyoming,
Oklahoma,
New Mexico,
Indian Territory,
Hawaii.

2. In the remaining twenty-seven States and Territories the condition of the law is as follows:

(a) In seven of those States and Territories, including New York, there are statutes substantially similar to Section 611 of the Penal Code, to the effect that a director, officer or agent of a corporation who knowingly concurs in making or publishing a written report or statement of its affairs or pecuniary condition containing any material statement which is false, is guilty of a misdemeanor. The element of fraud does not enter into the offense.

These States and Territories are:

NEW YORK, OREGON,
IDAHO, SOUTH DAKOTA,
MINNESOTA, UTAH.
NORTH DAKOTA,

(b) In two States and one Territory the offense which is in terms the same as that defined by the New York Penal Code is made a *felony*. They are:

CALIFORNIA, MONTANA,
ARIZONA.

(c) In one State the offense is like that of New York, but is punishable by fine only. That State is:

KENTUCKY.

(d) In five States and Territories, the false statement must have been made with intent to deceive. These are the only States in which the law is similar to the English law.

They are:

NEW JERSEY, MARYLAND,
PENNSYLVANIA, ALASKA,
WISCONSIN.

(e) In one State the making of false statements by officers or directors for the purpose of depreciating the market value of its stock or bonds, and with the further intent to enable the officer or director to buy them in at less than real value, is made penal.

This has clearly no relation to the offence here charged.

ALABAMA.

(f) In one State intentional fraud in deceiving the public or individuals in relation to the means or liabilities of corporations is made penal.

This also wholly foreign to the offence charged.

IOWA.

(g) In one State the making and publishing of false reports of liabilities is made a misdemeanor.

TENNESSEE.

(h) In one State the offense is limited to officers and directors of manufacturing companies :

SOUTH CAROLINA.

(i) In two States the criminal offense relates only to the making of false entries in the books of a corporation with fraudulent intent :

FLORIDA. MASSACHUSETTS.

(j) In four States it relates only to the making of fraudulent statement by directors of banking corporations and of no other corporations :

ARKANSAS. NEBRASKA.
LOUISIANA. NEW HAMPSHIRE.

(k) In one State it is confined to the fraudulent disposition of property and cancelling bonds :

KANSAS.

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It thus appears that the only states and territories which make criminal the *fraud* of a director in making a false statement or report *with intent to deceive*, a crime equivalent to that defined by Section 84 of the English Larceny Act, are:

NEW JERSEY, PENNSYLVANIA,
MISSOURI, MARYLAND,
ALASKA.

The contention of the British Government resolves itself into this: That if, instead of landing in New York, the petitioner had landed at Newport, Boston, Portland, New Haven, Detroit, New Orleans, Richmond, Seattle, or in any of the other states in which the act with which the appellant stands charged is not made criminal, he could not be extradited.

It is a *reductio ad absurdum* to say that the right of extradition depends upon the question as to whether a person charged with crime and proceeded against is arrested in one state rather than in another.

The test laid down in the Windsor Case is the correct one: Is the act made criminal by the statutes prevailing throughout the United States, by the general law of this country?

Here, in most of the states and territories no such crime as that charged against the appellant is known; and in those states in which there is some statutory regulation on the subject, the crime created differs in essential particulars from that which is the subject of the English legislation.

II.

The Court below in the exercise of its inherent power, had the power and jurisdiction to admit the appellant to bail.

The Commissioner denied the application for bail on the sole ground, as shown in his return, that there was

no power to admit one arrested under the Extradition Law to bail.

Judge LACOMBE denied the right to give bail solely on the ground that the Court had no power or jurisdiction to grant the appellant's prayer in that regard.

This conclusion is based on the theory that because the Extradition Treaty with Great Britain, and Sections 5270–5280 of the United States Revised Statutes with relation to extradition, contain no specific provision on the subject, the power does not exist.

It is to be noted that neither the treaty nor the Revised Statutes contain any prohibition against admitting a prisoner to bail. In the absence of such a prohibition it is insisted that the United States Circuit Court, in the exercise of its inherent and incidental powers, may take bail, and that the Commissioner had the like power.

The position of the appellee is in substance this:

If the appellant had been charged with the commission of any crime, not capital, however heinous in character, against the United States of America, he would have had the right to be admitted to bail.

If he had been arrested in England on the charge now made against him, the right to give bail would have existed.

If he had been a fugitive from the United States, and had been arrested in British territory for an extraditable offense, he could have been admitted to bail.

If he had fled to New York from another State, he might, pending interstate extradition proceedings, have been discharged on bail.

But, although he is a citizen of the United States, although he has not been indicted in England for any offense, although he remained there more than two years after the time when he is alleged to have committed the crime for which he is sought to be extradited, and the public authorities declined to prosecute him, he is denied the right to give bail in these proceedings, because he is charged with having committed

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a crime against a foreign government, and there is no express provision in the treaty or statutes providing for bail.

A brief examination of the authorities will, we think, demonstrate that it is the policy of our Government to admit to bail any person arrested in any kind of proceeding, except for contempt and prosecutions for capital offences.

1. THE LAW AND DECISIONS OF THE UNITED STATES.

The Eighth Amendment of the Federal Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Article I., Section 5, of the Constitution of the State of New York, provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, nor shall witnesses be unreasonably detained."

Similar provisions are found in the Constitutions of most of the States.

Section 1015 of the United States Revised Statutes provides:

"Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

The power of a United States Commissioner to admit a prisoner to bail, is fully discussed by Judge COXE in a note prepared by him, to the case of *United States vs. Hom Hing, 48 Fed. Rep., 638-640.*

There is nothing in the Statutes of the United States which to the slightest degree deprives the Circuit Court of the United States of the power to admit a prisoner to bail in a case like the present.

It is the policy of the United States to admit to bail any prisoner arrested, except in cases punishable by death, as a matter of right, and this is indicated by the practise in cases of removal of prisoners from one district of the United States to another, in cases of deportation, in cases of interstate extradition, and in criminal cases generally.

In *United States vs. Hamilton, 3 Dallas, 17*, decided in 1795, this Court on an application for a writ of *habeas corpus* issued at the instance of a prisoner who had been committed upon the warrant of the District Judge of Pennsylvania, admitted him to bail.

That decision was cited with approval in *Ex parte Virginia, 100 U. S., 343.*

In *Hudson vs. Parker, 156 U. S., 277* (decided in 1894), it was held that on a writ of error in the case of a conviction of an infamous but not capital crime the prisoner is entitled to be admitted to bail, and that where the Judge before whom the conviction occurred declines to so admit to bail he may be compelled to do so by writ of mandamus.

Mr. Justice GRAY said:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in a court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error. The statute as to bail upon arrest and before trial provide that bail may be admitted upon all arrests in capital cases, and 'shall be admitted' upon all arrests in other criminal cases; and may be taken in capital cases by this Court, or by a Justice thereof, or by a Circuit Court, a Circuit Judge or a district Judge, and in other criminal cases by any Justice or Judge of the United States, or other magistrate named (Rev. Stat., §§ 1014-1016)."

In *Benson vs. McMahon, 127 U. S., 457, 462*, Mr. Justice MILLER while considering the general nature of

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extradition proceedings seemed to intimate by his analogy that bail might be taken in those proceedings.

"Taking the provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment *or under bail*, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him."

In *U. S. Volz (14 Blatchf., 15; 28 Fed. Cas., 384)*, Judge BENEDICT, considering a case involving the removal of a prisoner from one district to another, said:

"It has been contended in behalf of the defendant, that at the time this oath was administered, the commissioner had no power to release Somerville on bail, and, consequently, no power to take the justification of a surety, because the offense appeared to have been committed in another district, and Somerville stood committed to await the action of the district judge in regard to his removal to such district for trial. It is claimed that the power of the commissioner terminated with the issuing of the commitment. I do not so understand the law. The power to take bail exists in every case where a party has been arrested for any crime or offense against the United States, and it is in all cases to be taken for trial before such court of the United States as by law has cognizance of the offense. This power never ceases with the issuing of a commitment. The requirement of the statute (section 1015) is, that 'bail shall be admitted upon all arrests in criminal cases, where the offense is not punishable by death'; and, in such cases, it may be taken by any of the persons authorized by section 1014 to arrest and imprison offenders. There is no provision that the right to give bail is to cease with the issuing of a removal warrant, and certainly the right must exist so long as no such warrant is issued. Until the removal warrant is issued, the prisoner is held in arrest under

the commitment of the commissioner, and to that officer application may be made to be released from arrest, on giving bail for trial before such court of the United States as the commissioner shall determine to have cognizance of the offense as proved before him. What power the commissioner may have after the district judge shall have issued his warrant, directing the prisoner to be removed to another district for trial, it is unnecessary now to consider. But it seems plain that, up to the time of the issuing of a removal warrant, the commissioner under whose commitment the prisoner is held has jurisdiction to entertain an application for his release on bail, and, by necessary consequence jurisdiction to administer an oath to one tendering himself for justification as good bail for such prisoner. I am, therefore, of the opinion that the offense of perjury, as defined by the statute, was committed by the accused, when, in a proceeding taken before Commissioner Osborn, to justify himself against the exceptions of the district attorney to his sufficiency as bail for Somerville, a prisoner at that time in custody under the commitment of Commissioner Osborn, and entitled to be released by such commissioner upon giving good bail, he made a deposition containing material statements touching his property, which he did not believe to be true."

In *U. S. vs. Rundlett (2 Curt., 41; 27 Fed. Cas., 915)* it was held that a Commissioner, appointed to take affidavits, &c., under the acts of Congress, has power to let to bail, one brought before him on a criminal complaint, pending the proceedings, in those States where Justices of the Peace have a similar power, and a recognizance to appear before him to have the proceedings completed is valid.

In *U. S. vs. Dana (68 Fed. Rep., 886, 892, 893)*, Judge BROWN said :

" The proceedings for commitment and removal are founded solely on section 1014 of the revised statutes. Plainly, therefore, they must conform to the conditions enjoined by that section. Cases like U. S. vs. Berry, 4 Fed., 779, and U. S. vs. White, 2 Wash. C. C., 29, Fed. Cas. No. 16,685, which did not arise under section 1014, nor involve its application, have little bearing on the question. The proceedings must also con-

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form to the fourth amendment of the constitution, which provides that 'no warrant shall issue but upon probable cause, supported by oath or affirmation.' Section 1014 is as follows :

"'For any crime or offence against the United States the offender may * * * by any justice or judge of the United States, or by any commissioner, &c., or by any judge of the Supreme Court, etc., * * * justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed for trial before such court of the United States as by law ("as by this act," says section 33 of the Judiciary act) has cognizance of the offence. Copies of the process shall be returned as speedily as may be unto the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case ; and where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant of removal to the district where the trial is to be had.

"The whole structure of this section, its provisions in regard to bail, recognizances, witnesses and commitment, and the express provision that the proceeding shall be 'agreeably to the usual mode of process against offenders in such state,' show that the familiar common law proceeding upon complainant for the arrest and commitment of offenders by committing magistrates was intended to be adopted and followed subject to the provision adopting the procedure of the several states. Even the magistrates named are almost identical with those named in the state statutes.

"The proceeding contemplated by section 1014 is, moreover, an original and independent proceeding. It makes no reference to any indictment found elsewhere, nor is there any different provision for such cases. In those cases, by the common law practice, and by the state practice, the defendant, if within the state or kingdom, was arrested upon a bench warrant, or a warrant signed by a justice of the peace, issued directly upon the finding of the grand jury. The bench warrant ran throughout the state, or kingdom ; a justice's warrant had to be 'backed,' or endorsed, by a justice in the county where the defendant was found. 1 Chit. Cr. Law, 342 ; Code

Cr. Proc. N. Y., § 304. As congress has not authorized that mode of proceding upon federal indictments, if the defendant is not within the district where the indictment is found, resort must be had, as it is now considered, to an original proceeding by complaint under section 1014; and whenever that section is appealed to, the procedure required by it must be observed, whether there has been a previous indictment found elsewhere or not. The requirement that the proceeding shall be 'agreeably to the usual mode of process against offenders in such state,' 'was designed,' says Mr. Justice CURTIS, in U. S. v. Rundlett, 2 Curt., 41; Fed. Cas., No. 16208, 'to assimilate all the proceedings for holding accused persons * * * to the proceedings had for similar purposes by the laws of the state where the proceedings should take place.' The words 'mode of process,' he says, are synonymous with 'mode of proceding.'

"This must embrace the preliminary examination usual in the state, including the taking of evidence, depositions, and the examination of witnesses, and the duty of the magistrate in finding probable cause; because, aside from this clause, there is no rule on those subjects; and it cannot have been intended that the proceedings should be conducted arbitrarily, and without any rule at all. The provision also for the commitment of witnesses, contemplates their presence and examination. In making this provision for an observance of the practice in use in the state where the arrest is made, it may be reasonably presumed that the intention of the Judiciary Act was to prevent the hateful appearance of employing summary and arbitrary methods of removal, and to avoid creating prejudice against the new government which would be likely to be engendered through courses of procedure to which the people of the several states were not accustomed, and against which they had just successfully fought. The construction of treaty stipulations is analogous. *In re* Farez, 7 Blatchf., 345, 357; Fed. Cas., No. 4,645."

In cases which have arisen under the Chinese Exclusion Act, the proceedings under which are analogous to those in extradition, the right to give bail has been recognized.

In *Re Ah Kee, 21 Fed. Rep., 701,* proceedings by *habeas corpus* were instituted to test the right of a Chinese laborer to re-enter the United States. It was

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held that, pending the proceedings, the Court might order that he continue in the custody of the party detaining him, or commit him to the custody of the marshal, *or release him on bail* to await a decision of the question of his deportation, and that when he has been released on bail he is still deemed in the custody of the law and as never having been landed.

In *Re Chow Goo Pooi, 25 Fed. Rep., 77*, in a similar proceeding, the Court, composed of Judges SAWYER, HOFFMAN and SABIN, said :

"We are unanimously of opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the United States, and that he is entitled as of common right to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body, in obedience to the writ, is produced in court, we are also of opinion that the control of his person remains with the court and that he may be committed to the custody of the marshal or be held in bail to await the decision of the court. If, on the investigation, the court should be of opinion that he had no right to land, it is its duty to remand him to the custody from which he was taken, if the ship be in port and about to return to the country from whence he came."

In the course of the opinion the Court likened the proceedings for deportation to those in extradition (p. 81).

2. THE LAW OF NEW YORK.

The Code of Criminal Procedure, in Sections 550–592, makes the amplest provisions on the subject of bail. By Section 553 it is declared that in cases of misdemeanor a defendant may before conviction be admitted to bail as a matter of right.

Section 831 of the Code of Criminal Procedure,

which relates to fugitives from another State or territory into New York State for whose delivery a requisition has been made by another State, provides:

"Any Judge of any court named in Section eight hundred and twenty-seven may in his discretion, admit the person arrested to bail, by an undertaking with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, which must not be later than the expiration of thirty days from the date of arrest, exclusive of such date, and for his surrender to be asserted upon the warrant of the Governor of this State."

In *State vs. Hufford, 23 Iowa, 579*, it has been held in a similar proceeding that the right to give bail exists.

The adjudications of the New York courts with regard to the inherent power of the courts to admit a defendant to bail are considered under subdivision 4.

3. THE DECISIONS IN ENGLAND AND CANADA ON THE RIGHT TO BAIL IN EXTRADITION CASES.

The precise question here involved was passed upon in *Queen vs. Spillsbury, 2 Q. B. D. (1898), 615*, by Lord RUSSELL, of Killowen, and by Justices WRIGHT and KENNEDY in a case where a prisoner who had been guilty of a riotous assembly and an attack upon the navy of the Sulton of Morocco had, after an examination by the committing magistrate in London, been remanded for surrender. Under the English statute he was to be kept in custody for a period of fifteen days after such remand: and during that period an application was made for a writ of *habeas corpus* to review the adjudication of the committing magistrate, which held the prisoner guilty of an extraditable offense, and his discharge, or, in the alternative, for an order admitting him to bail.

Lord RUSSELL, after considering the testimony, came to the conclusion that a case of criminality had been made out which justified the direction of the committing magistrate that the prisoner should be surren-

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dered; but on the question of the right to give bail, even at so late a day in the proceedings as is indicated, it was decided that the power existed.

The opinion then proceeds:

"Now arises a question of some difficulty. Failing the application to set aside the order for the return of the defendant, he asks that he may be admitted to bail until the time when he is to be returned. So far as I know this is the first occasion on which this question has arisen for decision. It is necessary to consider first how the question is to be viewed. Was Mr. Sutton right in saying that the defendant was bound to show that power is given to admit to bail under the Fugitive Offenders Act, 1881, or, in other words, is the onus of showing that the power to admit to bail exists cast on the defendant? I think not. This Court has, independently of statute, by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way; does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power? The law relating to this subject is well stated in 1 Chitty's Criminal Law, 2nd Ed., p. 97, as follows: 'The Court of King's Bench, or any Judge thereof in vacation, not being restrained or affected by the statute 3 Edward, 1, c. 15 (1), in the plentitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the committment is for contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rape, horse-stealing, libels and for all felonies and offences whatever.' I now proceed to examine the question whether in the present case the Fugitive Offenders Act, 1881, excludes or circumscribes the power of this Court to admit prisoners to bail. It is not suggested that it does so by express words. The question then arises whether it does so by implication. If it does, a curious result would follow, for it is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him; it is also conceded, that when the defendant is returned to the place

to which his return is demanded, the tribunal having jurisdiction in that place can admit him to bail pending the result of the trial; and, this being so, it would be a strange result if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return. Therefore, forming the best judgment I can, I am of the opinion that this Court has the power to admit a defendant to bail in such a case as the present. Mr. Sutton put this point: Supposing a defendant, having committed by the magistrate, is admitted to bail by this Court, how is he to apply for a Habeas Corpus, seeing that he is already at large? I think there is really nothing in the point. He could apply for a habeas corpus before he was released on bail, but the language of s. 5 of the Act is conclusive. That section provides that 'where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*, or other like process.' These concluding words show that, if the fugitive is committed to prison he may apply for a writ of *habeas corpus* or other like process, 'on grounds which go to the validity of the order for his return, and he would have the same right to apply if he were released on bail. Another point was taken which raises a little more difficulty. It was suggested that if a man were admitted to bail, and he went away and declined to surrender, there would be no remedy except by entreating the recognizances, which would not have the effect of carrying out the intention of the Act; but in such a case it cannot be denied that the proceedings might be commenced *de novo* and a fresh warrant issued, on which the accused could be arrested; this might, no doubt, cause delay, but the difficulty would not be insuperable. For these reasons, having carefully considered the different sections of the Act, and admitting that some difficulty might possibly arise in working out the procedure, I have come to the conclusion that the provisions of the statute are consistent with the recognition of the power of this Court to admit to bail in such cases as the present. This inherent power to admit to bail is historical, and has long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment."

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It will be seen that two proposition were clearly decided, (1) that unless the Extradition Act withheld or limited the power of the Court to admit the prisoner to bail, the inherent powers of the Court in that regard were not affected; (2) that it was one of the inherent powers of the Court to admit a prisoner to bail.

In *ex parte Foster*, decided by the Court of Queen's Bench in Canada, in 1872 (reported in Consolidated Digest of Quebec, under title Extradition), it appeared that Foster had been committed for extradition under the treaty between the United States and Great Britain. The next term of Court at which a review of the decision could take place was to be held seven days thereafter. On a writ of *habeas corpus* the prisoner was admitted to bail pending the proceedings.

4. THE INHERENT POWERS OF COURTS WITH REGARD TO BAIL.

It may be stated as a general rule that any court or magistrate that has jurisdiction to try a prisoner in any case has jurisdiction to discharge him, and *a fortiori*, to admit him to bail. The power to bail must be incident to the power to hear and determine. If the Court has power to grant a gratuitous discharge, it must follow that it has power to discharge *sub modo*. If it has power to discharge without bail, *a fortiori*, it may discharge with bail.

An interesting historical discussion on the right to admit a prisoner to bail is contained in the report of the case of *People vs. Goodwin, 1 Wheeler's Criminal Cases, 434*, where the inherent power possessed by courts in that regard was thoroughly considered by Chief Justice SPENCER, and the authorities elaborately reviewed.

In *People vs. McLeod, 1 Hill, 377*, the use of the writ of *habeas corpus* for the purpose of admitting a prisoner to bail was recognized by Mr. Justice COWEN; although in that case, which was one in which the prisoner had been indicted for murder, the offense was

considered not bailable. In a note, on page 393, the case of Aaron Burr is adverted to, and reference is made to the fact that Chief-Justice MARSHALL, who sat as a Commiting Magistrate, admitted Burr to bail on the preliminary examination which was held before him in person *(1 Burr's Trial, by Robertson, 18-20, also 106)*. Subsequently, when Burr was indicted, an application was made to admit the prisoner to bail, and in the course of the discussion the Chief-Justice declared, " that the act of Congress, in express terms, enabled the court to bail a prisoner arrested for treason. That there was no distinction between treason and other criminal cases, as to the power to bail upon arrests; but that an arrest might be after a finding by a grand jury; in which case, the finding of the grand jury would be the evidence on which the court would have to judge, whether the party arrested ought to be bailed. They were to exercise their discretion according to the nature and circumstances of the offense, and of the evidence and usages of law; that the usages of law were to be found in the common law, and the practice of the courts."

In *People vs. Van Horne, 8 Barb., 158*, a prisoner who had been indicted for murder was admitted to bail by the Court of Oyer and Terminer. In the course of his opinion Mr. Justice PAIGE said :

" We entertain no doubts in relation to our power to bail in this case. The power of the Supreme Court, or of a justice thereof, to bail in all cases, whether it be treason, murder, arson or any other offense, is indisputable. The same power is possessed by this court. The power to bail is incident to the power to hear and determine."

At page 167 he says :

" As I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had. Chief-Justice SPENCER (People v. Goodwin) says, ' Until his guilt is legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it.' "

In *State Treasurer vs. Rolfe, 15 Vt., 9*, the Court said :

"It is undoubtedly incident to every court having criminal jurisdiction, not only to bring the offender before them, but to take bail for his appearance in such form as shall secure the object intended, to wit, the appearance of the person accused, at all times when required."

See, also, *State vs. Edney, 4 Dev. & B., 378.*

The Court of King's Bench or any Judge thereof had the amplest discretion to admit to bail in all cases whatsoever.

Rex vs. Rudd, Cowp., 331.
Rex vs. Marks, 3 East, 157.
Rex vs. Baltimore, 4 Burrows, 2179.

In 3 Hawk. Pl. Cr., 225, it is said :

"The Court of King's Bench has the power to bail in all cases whatsoever, and the judges will, in general, exercise it in favor of a prisoner in every case not capital, and in capital cases where there is any circumstance to induce the court to suppose he may be innocent, and in every case where the charge is not alleged with sufficient certainty."

See, also,

4 Black. Com., 299.
2 Hale's Pl. Cr., 129.
4 Cokes Inst., 71.

In *Comb's Case, 10 Mod., 334*, it was held that the Court of King's Bench has power to bail for high treason.

The *Habeas Carpus Act (31 Charles II.)* was enacted for the purpose, among others, of making the right to give bail a constitutional privilege.

This right is especially enforced in cases of misdemeanor where it is absolute at any stage of the proceedings before final commitment.

2 Hale's Pl. Cr., 128.
Rex vs. Judd, 2 T. R,, 255.
Linford vs. Fitzroy, 13 Jur., 303.
Ex parte Tayloe, 5 Cow., 39.

In *U. S. vs. Evans, 2 Fed. Rep., 152*, Judge HAMMOND speaks of the inherent power of the Courts to take bail.

The opinion of Lord RUSSELL in *Queen vs. Spilsbury (supra)* recognizes the existence of the inherent power of the Court in this particular, to the fullest extent.

The American text-writers are equally pronounced in their views :

In *Church on Habeas Corpus (2d Edition), Section 390*, the author says :

" The right to bail existed at the ancient common law, and though the prisoner could not demand bail as a matter of right, he might, and still may, except where the matter is otherwise regulated by statute, be admitted to bail for any offense. He could be bailed for treason, murder, manslaughter, forgery, rape, libels —in short, as we have said, for all felonies and misdemeanors whatsoever. This plentitude of power was exercised by the Court of King's Bench or any judge thereof in vacation, but the general rule was, ' *Whosoever is judge of the offense may bail the offender.*' This power rested in the sound legal discretion of the judge awarding the writ of *habeas corpus ;* but in the rules which the court and judges observed, they were guided by a series of decisions ; for the discretion to be exercised by a court of justice is not a wild but a sound discretion, and to be confined within those limits to which an honest man, competent to discharge the duties of his office, ought to confine himself."

At *Section 395* he says :

" In ancient times, the sheriff possessed judicial powers as well as ministerial, and was the principal bailing officer. In many states of the American Union he may take bail ; in others, not. Bishop evolves this rule from the authorities : ' In general, all judges of the superior courts, and especially those who are authorized to issue the writ of *habeas corpus*, whether sitting as a court or in chambers, may grant bail in criminal cases. On narrower ground, the power to hear an accusation carries with it the authority to bail the accused person if bailable ; and there are circumstances and localities in which a judge not having this jurisdiction cannot take bail. A justice of the peace while exercising a jurisdiction over a particular cause,

not finally disposed of, can, as incident thereto, grant bail. And by the statutes in some of the states his authority extends somewhat further. But he has not the full power of the judges of the higher courts."

See, also, *1 Bishop's New Criminal Procedure*, §§ *251*, *1406*, *1407*.

In answer to these authorities Judge LACOMBE suggests (Rec., p. 12) that they are not persuasive because they are based on what Lord RUSSELL has termed the "historical" inherent power of the Court of King's Bench to admit to bail independently of statute, and urges that the Circuit Courts of the United States have no such historical heritage but are the creatures of statute and have only so much of the judicial power of the United States as the acts of Congress have conferred upon them.

While it is true that these Courts are of statutory origin, it does not follow that it is necessary to point to a statute in every instance as authority for the exercise by those Courts of judicial powers. As Courts, they possess those powers which are of necessity incident to all Courts, such powers as are ordinarily denominated inherent.

Among these is the power to punish for contempt, to control their records, to correct mistakes and clerical errors, to make rules, to control calendars, to perform the ordinary functions of a judicial tribunal. It is our contention that among such incidental and inherent powers is the power to admit to bail a prisoner, who is regularly before the Court in a proceeding in the course of which the Court has the right to discharge the accused absolutely. *Omne majus in se continet minus.*

Among other authorities which indicate the possession of such inherent powers, even by Courts of statutory creation, we instance the following:

In *Ex parte Robinson*, *19 Wall.*, *505*, *510*, Mr. Justice FIELD said:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preserva-

tion of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. *The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.*"

To the same effect are:

U. S. vs. Hudson, 7 Cranch, 302.
Anderson vs. Dunn, 6 Wheat., 204, 227.
Ex parte Terry, 128 U. S., 302, 303.
Cartright's Case, 114 Mass., 230, 238.

The opinion of Judge SAWYER *in re Neagle, 39 Fed. Rep., 856, 857,* contains an interesting discussion of the inherent powers of the Courts to protect themselves, and the English origin of such powers.

The exercise of ancillary jurisdiction by the United States Circuit Courts irrespective of diversity of citizenship has been expressly predicated on the ground that "the powers both of courts of equity and courts of law over their own process to prevent abuse, oppression and injustice *are inherent.*"

Freeman vs. Howe, 24 How., 450.
Krippendorf vs. Hyde, 110 U. S., 276.
Grumbel vs. Pitkin, 124 U. S., 131, 143.

Although in *Bath County vs. Amy 13 Wall., 244,* which is relied upon by Judge LACOMBE to support his position, it was held that the United States Circuit Courts have no original jurisdiction in proceedings for mandamus, it was held in *Labette County Commissioners vs. United States, 112 U. S., 217,* that as incidental to jurisdiction previously acquired a mandamus could issue even to strangers, on the principle announced in *Krippendorf vs. Hyde (supra).*

In *Matter of Henderson, 157 N. Y., 423, 426,* Judge O'BRIEN, speaking of the Surrogate's Court, which is a statutory Court, said:

"Limitations upon the power of the court to do justice to suitors, or upon the right of parties to apply to the court for relief whether by suit or otherwise, have their basis wholly in some statute or positive law.

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At common law there was no limitation whatever. The party aggrieved could sue or invoke the aid of the court in his behalf at any time. The general powers of the surrogate's court are wholly statutory, but it certainly must possess such incidental powers as are necessary to a proper exercise of those expressly conferred. *All courts, from their very nature and the object of their existence, must possess some inherent power*, and the correction of their own records, when affected by some mistake or clerical error, would seem to be about as mild an exercise of such power as can well be imagined. This power is recognized and perhaps regulated by various statutes, but it does not proceed from or rest upon statutes, since it would exist without them."

Again conceding the statutory origin of the United States Circuit Courts, yet those Courts, in a general way, are, so far as subjects of federal cognizance are concerned, the counterpart of the Court of King's Bench, and proceed according to the practice and traditions of that Court.

Rule 3 of the rules of this Court provides that this Court considers the former practice of the Courts of King's Bench and of Chancery in England as affording outlines for the practice of this Court, and the reports are full of illustrations indicating that the Federal Courts have modeled their procedure and have exercised their powers within the jurisdiction over persons and subject matter conferred by statute, in accordance with the practice prevailing in the Court of King's Bench.

According to the appellee's contention the Federal Courts have no general jurisdiction in law and equity.

5. THE DECISION IN RE CARRIER.

The only authority which has been cited as adverse to appellant's contention, on this branch of the case, is the decision of Judge HALLETT in the United States District Court for Colorado *(in re Carrier, 57 Fed. Rep., 578,* decided in 1893).

An examination of that case, however, will indicate

that the Court proceeded upon the theory (1) that there was no provision in the Act of 1848 admitting a prisoner sought to be extradited to bail ; and (2) that the language of the Act of 1848 indicated that at a certain stage in the proceedings it is the duty of the Judge or Commissioner to issue his warrant for the commitment of the prisoner in charge to the proper jail, there to remain until such surrender shall be made, and that this negatives the right to bail.

The first of these reasons is in direct conflict with the reasoning of Lord RUSSELL in *Queen vs. Spillsbury*, and ignores not only the inherent powers of the Court, but also the public policy of the United States as declared by Mr. Justice GRAY in *Hudson vs. Parker, 156 U. S., 277*, which was decided one year subsequent to the decision in the *Carrier Case*.

In fact, the provision of section 5270 of the United States Revised Statutes (which is a re-enactment of the Extradition Act of 1848 to which reference is made), instead of being an authority for the contention of Judge HALLETT is really an authority for the converse of his proposition. It refers solely to the issuing of a warrant of commitment after there has been a hearing on the question of criminality and the evidence has been deemed sufficient to sustain the charge made by the demanding government. The very fact that the statute only refers to a commitment to the proper jail for the purposes of surrender, after such hearing and adjudication, negatives the idea that until there has been such an adjudication, bail cannot be taken.

Section 5270 reads as follows :

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any state, district or territory, with having committed

within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Furthermore, stress is laid on the fact that the Act of 1882 amended the Act of 1848 in respect to the manner of getting testimony and other subjects, but that the subject of bail was not touched upon. This argument, when the entire frame-work of the Extradition Act is considered, is really an authority in favor of our contention.

The Treaty of 1842 requires that the person apprehended shall be brought before a Judge or other magistrate,

"to the end that the evidence of criminality may be
"heard and considered, and if on such hearing the
"evidence be deemed sufficient to sustain the charge,
"it shall be the duty of the examining judge or magis-
"trate to certify the same to the proper executive
"authority that a warrant may issue for the surrender
"of such fugitive."

This language does not indicate a withholding of the right to give bail. It does require evidence of criminality. So did the Extradition Act of 1848.

In the absence of any statute to the contrary this evidence of criminality would necessarily have to be common-law evidence—that is, the oral testimony of witnesses and original documents would have to be

produced. Depositions would be insufficient to comply with the requirement of the treaty and the statute.

When, therefore, the Act of 1882 amended the provisions of the Act of 1848 with regard to the reception of depositions and proof other than common-law proof, Congress recognized the fact that but for such legislation the Courts would have been confined to the reception of common-law evidence. In other words, the inherent powers of the Courts were, in that regard, limited and circumscribed. In all other respects, however, the inherent rights and powers of the Courts were unaffected.

It follows that, in the absence of a provision in the treaty or in the statutes of the United States depriving the Courts of the power to take bail, such power exists.

That such power must exist in the present case is evident from these facts : If the petitioner had been indicted by the Grand Jury of the United States of an offense against the Government of the United States, however heinous it may have been, unless it were a capital one, he would have had the right to be admitted to bail. If he had been indicted for the offense with which he now stands charged in the Courts of England, he would, under the English law, have been entitled to give bail. He has not been indicted, however. He has been arrested on a complaint, based upon a cablegram. The offense with which he stands charged is, in our opinion, non-extraditable. No charge was made against him in England until he was on the high seas, on his way to this country, and he did not leave England until two years after the offenses with which he now stands charged were committed, and after the Attorney-General had declared in Parliament that no criminality attached to any acts done by the petitioner.

The Treaty permits of his detention for two months for the presentation of evidence of criminality. It could not have been contemplated that an American citizen should be deprived of his Constitutional right

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to bail during all that time without a hearing, and on a charge which, if committed in his own country, would not have been generally criminal, and which in some of the States where it is made criminal is punishable only by a fine.

He has already suffered six weeks imprisonment, though at all times prepared to furnish bail. What becomes of his Constitutional protection against excessive bail when he can be committed and held without bail?

To imprison the appellant under these circumstances without bail, is contrary to the policy of every civilized country, and it is not unreasonable to say that unless there is an express provision in the statute which deprives the Court of the power to admit the prisoner to bail, that power must be deemed to exist.

Rule 34 of the Supreme Court, which was referred to on the argument in the Court below does not seem to touch this case. That refers merely to the custody of prisoners after a final decision on a writ of *habeas corpus*. Where the writ is denied the custody of the prisoner is not to be disturbed. Where it is granted it is within the power of the Court to require surety from the prisoner for his appearance to answer the judgment of the Appellate Court, except where, for special reasons, sureties shall not be required.

This case is a typical case of an application for a writ of *habeas corpus* for the purpose of admitting the prisoner to bail pending an examination into his criminality. This office was conferred upon the writ of *habeas corpus* by 31 Charles II., and has been applied in many cases, *United States vs. Hamilton*, *Queen vs. Spillsbury*, *People vs. McLeod* and *In Re Carrier*, being illustrations.

It has been suggested that our government is under a moral obligation to surrender the prisoner, and that that obligation may not be met if the prisoner should escape while released on bail.

But the same argument might be used with respect to interstate extradition ; to the removal of a prisoner

arrested in this district to another district of the United States. It was made in the case of Queen vs. Spillsbury. It might be made in any case where a prisoner is admitted to bail.

Yet it is believed to be the uniform experience of the civilized world that when a prisoner is admitted to bail his sureties are interested with the government in providing for his attendance at the time required. This affords sufficient security to the government which admits the prisoner to bail that he will be forthcoming when directed to do so.

Judge LACOMBE intimates that the assumption of a treaty obligation by the United States affords a sufficient reason for not providing for enlargement on bail, lest if the person sought, to be extradited should escape while at large on bail, that obligation could not be performed. Yet the English goverment has not in the past been swayed by such considerations to the extent of surrendering its views on a subject of public policy, for during the administration of President Grant, it declined, for a period, to extradite any fugitives from the justice of the United States, notably the forger Winslow, because Mr. Fish, our Secretary of State, did not accede to the interpretation given to the treaty of 1842 by the English government. The diplomatic correspondence is fully set forth in *2 Wharton's Digest of Internatiinal Law, Article Extradition.*

1. Moore on Extradition, § 152.

It is also asked to whom the recognizance should run. The answer is simple—to the United States of America, of course. The warrant in this case is issued under the authority of the United States in the name of the President. The proceedings are in a tribunal of the United States. If the prisoner should be surrendered it would be by virtue of process issued under the seal of the United States. Hence, the recognizance must run to the government under whose sanction the proceedings are instituted; just as in the case of in-

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terstate extradition, the recognizance would run to the People of the State in whose tribunal the extradition proceedings are pending.

III.

Assuming that the power to take bail exists, there is every reason why the Court below should have admitted the appellant to bail.

The reasons considered under the last point do not require reiteration. The fact that the prisoner remained in England more than two years after the failure of the corporation of which he was a member, that he gave his testimony in insolvency proceedings concerning the affairs of the company and concealing nothing when interrogated with regard to its affairs, indicates that he will be forthcoming if it should be ultimately decided that the offence is extraditable and that proof of criminality exists.

It is a subject of public knowledge that the Attorney-General and Solicitor General of England stated on the floor of the House of Commons that after a careful and thorough examination no ground for a criminal charge existed, and that the present proceedings are the result not of a public but a private prosecution, after the Public Prosecutor of England, on application made to him, had refused to prosecute, and had been sustained in his action by the Prime Minister on the floor of the House of Commons. This is another reason why the Court should not hesitate to admit the prisoner to bail.

Furthermore, the proof shows that his health has been affected by his imprisonment and that he was in physical jeopardy by reason thereof, although his

physical condition is better than it was at the time when the affidavit of the physician which forms a part of the record was made.

IV.

It is respectfully submitted that the appellant should be discharged from imprisonment or at all events the Court below should be instructed to admit him to bail, pending the proceedings for his extradition.

Samuel Untermyer,
Louis Marshall,
Appellant's Counsel.

APPENDIX.

Legislation of the Several States and Territories with Regard to the Crimes of Corporate Directors.

ALABAMA.

(CRIMINAL CODE, 1896, VOL. II., SECS. 4737, 3819, 4375 :) KEEPING FALSE BOOKS OF ACCOUNTS BY OFFICERS OR AGENTS OF CORPORATIONS. Any officer, agent or servant of any private or municipal corporation who keeps false books or accounts, or makes false entries therein, with the intent to deceive, injure or defraud such corporation, or the officers or agents thereof, or, if a private corporation, the stockholders therein, must, on conviction, be fined not less than one hundred nor more than one thousand dollars, and may also be sentenced to hard labor for the County for not more than two years, one or both, at the discretion of the jury.

SECTION 4776. Any president, director or managing officer of any corporation, by whatsoever name or title he may be known or called, who shall do or omit to do any act, or who shall make any declaration or statement in writing or otherwise with the intent to depreciate the market value of the stock or bonds of such corporation and with the further intent to enable such president, director or other managing director to buy any such stock or bonds at less than the real value thereof, must on conviction be fined not more than $500 and shall be sentenced to hard labor for the county for not less than six nor more than twelve months.

ALASKA.

Penal Code, § 73 (Carter, 1900).

SECT. 73. *Officer, &c., of Corporations Falsifying Records.* That if any person being or assuming to be an officer, agent or member of any private corporation or company shall with intent to defraud or deceive any one, willfully and knowingly destroy, alter, mutilate or in any manner falsify or concur in the destruction, alteration, mutilation or falsification of any of the

books, papers, writings or securities belonging to or in the possession of such corporation or company, such person upon conviction thereof shall be punished by imprisonment in the county jail not less than three months nor more one year or by fine not less than $50 nor more than $1,000.

SECT. 74. *Officer, etc., of Corporations Publishing False Reports.* That if any person being or assuming to be an officer, agent or member of any private corporation or company shall, with intent to defraud or deceive any one, willfully and knowingly make, circulate or publish, or concur in the making, circulating or publishing, any written or printed statement or account concerning or relating to the liabilities, assets or property of such corporation or company, which statement or account shall be false in any material particular, such person upon conviction thereof shall be punished in the manner provided in Section 73.

ARIZONA.

Revised Statutes, 1901, Penal Code.

§ 507. (Fraudulent book entries or erasures by director, officer or agent of any corporation or joint stock association punishable by 3 to 10 years imprisonment, fine not exceeding $500).

§ 508. Every director, officer or agent of any corporation or joint stock association who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law other than such as are mentioned in this chapter is guilty of a felony.

ARKANSAS.

SECTION 1788. Any president, secretary, receiver, accounting officer, servant, agent or person who shall knowingly make any false answer to any question or statement required by law touching the business, property, moneys and credits of such person or corporation liable to taxation shall be deemed guilty of perjury.

(This crime classified among Offenses against the Revenue.

ACTS OF ARKANSAS, 1901. ACT VII.

An act to prohibit the making of false statements of banks and the receiving of money and deposits when insolvent, and to prescribe penalties for same.

SECTION 1. Prescribes penalties for employees of banks making false entries on books or statements.

2. Prohibits banks from receiving deposits when insolvent, and prescribes penalty for doing so.

3. Repeals all laws in conflict, and act takes effect from passage.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. Every officer, agent or clerk of any bank organized or doing business under the law of the State, who willfully and knowingly subscribes to, or makes any false reports, or any false statements or entries in the books of such bank, or knowingly subscribes or exhibits any false writing or paper, with the intent to deceive any person or persons as to the condition of such bank, shall be punished by fine not exceeding one thousand dollars ($1,000), and imprisoned in the county jail not exceeding one (1) year.

CALIFORNIA.

SECTION 564. Every director, officer or agent of any corporation or joint stock association, who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notices containing any material statement which is false, or refuses to make any book or post any notices required by law in the manner required by law other than such as are mentioned in this chapter is guilty of a felony.

COLORADO.

SECTION 494. If any certified report or statement made or public notice given by the officers of any corporation shall be false in any material representations, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom.

(No penal provision.)

CONNECTICUT.

(No penal provision.)

DELAWARE.

SECTION 31. If any certificate made or any public notice given by the officers of any company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

(No penal provision.)

FLORIDA.

Revised Statute, Section 2467. Any officer, agent, clerk or servant of a corporation, who makes a false entry in the books thereof, with intent to defraud * * * shall be punished by imprisonment in the State prison not exceeding ten years, etc.

GEORGIA.

No penal provision.

IDAHO.

SECTION 7121. Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, is guilty of a misdemeanor.

ILLINOIS.

SECTION 21. If any certified report or statement made or public notice given by the officers of any corporation shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom.

No penal provision.

INDIANA.

SECTION 5073. If any certificate or report made or public notice given by the officers of any such company, as required by this act, shall be false in any material representation, or if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate, or on account of such failure to make such report, and damaged thereby, then all the officers who shall sign the same knowing it to be false, or fail to give the notice or make the reports as aforesaid, shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company.

No penal provision.

IOWA.

CODE 1897.

§ 1623 *Keeping False Accounts.* The intentional keeping of false books or accounts shall be a misdemeanor on the part of any officer, agent, or employee of the corporation guilty thereof, or of any one whose duty it it is to see that such books or accounts are correctly kept.

§ 1620 *Fraud—Penalty for.* Intentional fraud in failing to comply substantially with the articles of incorporation or in deceiving the public or individuals in relation to their means or their liabilities, shall be a misdemeanor, and shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the Court. Any person who has sustained injury from such fraud may also recover damages therefor, against those guilty of participating in suchfraud.

KANSAS.

GENERAL STATUTES, 1901 (DASSLER).

§ 1411. *Liability of directors and officers,* § 169. Any officer, director, trustee, attorney, agent or servant of any association heretofore or hereafter to be incorporated, who shall use or dispose of any part

of the moneys, property, assets or funds of such association, or assign, transfer, cancel, deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized, or otherwise than in the regular and legitimate business of the corporation, or who shall be guilty of any fraud in the performance of his duties, shall be liable civilly to the corporation and also, to any other party injured, to the extent of the damage thereby caused, and shall, also, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than five years.

Kentucky Statutes, 1899 (Carroll).

§ 549. Officers and directors—liability for false report. If the directors or officers of any corporation shall knowingly cause to be published or given out any statement or report of the condition or business of the corporation that is false in any material respect, the officers and directors causing such report or statement to be published or given out, or assenting thereto, shall be jointly and severally individually liable for any loss or damage resulting therefrom.

§ 550. Directors and officers—penalty for violation of law. If the directors or officers of any corporation shall fail or refuse to comply with, or shall violate any of the provisions of this article, those so failing, refusing or violating shall be jointly and severally individually liable for and loss or damage resulting to any person from such failure, refusal or violation, and, in addition thereto, the persons so liable shall be each punished by a fine of not less than one hundred nor more than one thousand dollars.

Louisiana.

Revised Laws (Wolff, 1897).

§ 877. *False Statements or Perjury of Bankers.* Any banker, and any director, officer, agent or clerk of any banker or banking company, who shall make false statements or entries in the books of such banker or banking company, or who shall exhibit false papers or practice willful concealment of facts within his or their knowledge with intent to deceive the Board of Cur-

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rency or other person having lawful authority to examine, or to deceive the public as to the condition of such banker or banking company, as also any person who shall, with a view to defraud any such banker or banking company, knowingly draw or pay a check or checks without funds in the said company drawn upon, or to the embezzlement of any of the money or assets of said banker or banking company, by any clerk, officer or agent thereof, shall be subject on conviction to imprisonment in the penitentiary of this State for a term not less than one year nor more than three.

And when such false statements are made under oath the person or persons shall be adjudged guilty of perjury and punished according to law.

(No further provision.)

MARYLAND.

PUBLIC GENERAL LAWS (ART. XXVII.), 1888.

§ 97. Any officer or agent whatsoever of any corporation who shall fraudulently sign, or in any other manner assent to any statement or publication, either for the public or the shareholders thereof, containing untruthful representations of its affairs, assets or liabilities, with a view to enhance or depress the market value of the shares therein, or the value of its corporate obligations, or in any other manner to accomplish any fraud thereby, shall be deemed guilty of a misdemeanor, and upon conviction thereof, by indictment in any Court of Law, shall be fined not less than one thousand dollars nor more than ten thousand dollars, and be imprisoned in jail or penitentiary, or either fined or imprisoned, at the discretion of the Court, for not less than six months nor more than three years.

MASSACHUSETTS.

REVISED LAWS 1902, VOL. 2, p. 1757:

§ 58. An officer of a corporation, or an agent, clerk or servant of a person, firm or corporation who makes a false entry or omits to make a true entry in any book of such person, firm or corporation with intent to defraud, and any person whose duty it is to make a record or entry of the transfer of stock, or of the issuing or canceling of certificates thereof, or of the amount

of stock issued by a corporation, in any book thereof, who, with intent to defraud, omits to make a true record or entry thereof, shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than one year.

§ 56. (Officer, agent, &c., of corporation who issues stock certificate or bond, note, &c., beyond amount authorized by law, or negotiates same with intent to defraud, punishable by imprisonment.)

§ 57. (Officer, &c., of corporation who fraudulently issues stock certificate to person not entitled, punishable by imprisonment.)

§ 62. (Officer, &c., of corporation who uses name of corporation to obtain money on the credit of the corporation for his own use without authority from the corporation, or who fraudulently invests or disposes of money of corporation, punishable by imprisonment.)

§ 64. Whoever is convicted of any gross fraud or cheat at common law shall be punished by imprisonment, &c.

(No further provisions.)

MAINE.

(No penal provision.)

MINNESOTA.

SECTION 6449. A director, officer or agent of any corporation, or joint stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are elsewhere by this Code specially made punishable, is guilty of a misdemeanor.

MICHIGAN.

(No penal provision.)

MISSISSIPPI.

(No penal provision.)

MISSOURI.

(No penal provision.)

MONTANA.

SECTION 988. Every director, officer or agent of any corporation, or joint stock association, who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law, in the manner required by law, other than such as are mentioned in this chapter, is guilty of a felony.

NEBRASKA.

COMPILED STATUTES, 1901.

§ 630 [Sec. 15]*. *False Statements.* Any person or persons who shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, corporation partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person or persons authorized to examine into the affairs of said bank, corporation, partnership, firm or individual, or shall make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, partnership, firm or individual, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the State Penitentiary not less than one year nor more than ten years.

*NOTE. This is § 15 of Chapter 8 relating to "Banks," being also § 15 of the Act of 1895, entitled "An Act to establish a State Banking Board to define and designate State banks and to regulate said State banks. * * *"

(No further provision.)

NEW HAMPSHIRE.

L. 1895, Ch. 105, "An Act in relation to Savings Banks, State Banks and Trust Companies."

§ 5. That provision of law which requires a semi-annual examination of savings banks and semi-annual reports to the bank commissioner shall also be applicable to State banks and trust companies; and any

trustee or director of a savings bank, State bank or trust company, who shall make a statement which purports to be the condition of an institution examined by him without having fully and carefully examined into the condition of such institution, or who shall make a false statement of the condition of such institution with an intent to deceive, shall be fined one thousand dollars or be imprisoned not exceeding five years for each offence.

NEVADA.

(No penal provision.)

NEW JERSEY.

SECTION 157. That whosoever being a director, manager or public officer of any body corporate, or public company, shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of any such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to imprisonment at hard labor, not to exceed two years, or fine not exceeding four hundred dollars, or both.

NORTH CAROLINA.

SECTION 686. * * * In case of fraud by the president, directors, managers or stockholders in any corporation, the Court shall render personally liable to creditors and others injured thereby, such of the directors and stockholders as may have been concerned in the fraud.

(No penal provision.)

NORTH DAKOTA.

SECTION 7527. Every director, officer or agent of any joint-stock association who knowingly concurs in mak-

ing or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than are mentioned in Sections 7516 and 7517, or who wilfully refuses or neglects to make or deliver any written report, exhibit or statement required by law, is guilty of a misdemeanor.

OHIO.

SECTION 3245. * * * If the Board of Directors fail to make the annual statements required by this section, or if they make a false statement, they shall be personally liable for all claims and demands against such corporation.

(No penal provision.)

OREGON.

SECTION 1803. If any person, being, or assuming to be, an officer, agent or member of any private corporation or company, shall, with intent to defraud or deceive any one, wilfully and knowingly make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account concerning or relating to the liabilities, assets or property of such corporation or company, which statement or account shall be false in any material particular, such person, upon conviction thereof, shall be punished in manner provided in Section 1801.

(SECTION 1801. Imprisonment, three months to one year; fine, $50 to $1,000.)

PENNSYLVANIA.

PEPPER AND LEWIS DIGEST, 1896.

CRIMES (LX.) FALSE PRETENSES.

266. False statements by officers and servants of corporations. If any officer, director, superintendent, manager, receiver, employee, agent, attorney, broker or member of any bank or other body corporate or public company, municipal or quasi-municipal corporation, shall make, circulate or publish or concur in making, circulating or publishing, any written or

printed statement or account, which he shall know to be false in any particular with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, municipal or quasi-municipal corporation, or with intent to induce any person to become a shareholder or partner therein, or to interest or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor. 1878, June 12, P. L. 196, § 4.

RHODE ISLAND.

SECTION 20. If any certificate made or any public notice given by the officers of any manufacturing company, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

No penal provision.

SOUTH CAROLINA.

SECTION 195. Any director or other officer or stockholder of any manufacturing company in this State, who shall knowingly or wilfully make, or cause to be made, any fraudulent misrepresentation or misrepresentations as to either the capital, property or resources of said corporation, shall be held guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not more than $2,000 or imprisonment for not longer than two years, or both, at the discretion of the Court.

SOUTH DAKOTA.

SECTION 6853. Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishes any written report, exhibit or statement of its affairs, or pecuniary condition, containing any material statement which is false, other than as are mentioned in sections 6842 and 6843, or wilfully refuses or neglects to make or deliver any written report, exhibit or statement required by law, is guilty of a misdemeanor.

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TENNESSEE.

SECTION 1716. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders or directors knowingly participating therein, to the penalties of a misdemeanor; and, moreover, to damages at the suit of any person injured thereby.

SECTION 1717. The diversion of the funds of the corporation to other objects than those mentioned in the incorporation; the payment of dividends which leave insufficient funds to meet the liabilities of the corporation; the keeping of false books or accounts, whereby any one is injured; and the making and publishing of false reports, are such frauds as will subject those actively concerned therein to the penalties of the preceding section.

TEXAS.

(No penal provision.)

UTAH.

SECTION 4414. Every director, officer or agent of any corporation, or joint-stock association, and every private banker who knowingly makes or concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are mentioned in this chapter, is guilty of a misdemeanor.

VERMONT.

(No penal provision.)

VIRGINIA.

(No penal provision.)

WASHINGTON.

(No penal provision.)

WEST VIRGINIA.

(No penal provision.)

WISCONSIN.

SECTION 4435. Any director, officer or manager of any body corporate or public company, * * * who shall make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account, which he shall know to be false in any particular, with intent to deceive or defraud any member, shareholder or creditor, of any such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to, or to enter into any security for the benefit of such body corporate or public company, * * * shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars.

WYOMING.

(No penal provision.)

OKLAHOMA.

(No provision.)

NEW MEXICO.

(No provision.)

INDIAN TERRITORY.

(No provision.)

HAWAII.

Penal and Civil Codes, 1897.
(Nothing found.)

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

AGAINST

WILLIAM HENKEL, Marshal of the United States for the Southern District of New York, *et al.*,
Appellees.

APPELLANT'S BRIEF ON APPELLEE'S OFFER TO WITHDRAW WARRANT.

The appellant was arrested under a warrant issued March 16th, 1903. He was arraigned on this warrant before the Commissioner and demanded an examination, which was set for March 18th, 1903. On that day he moved for a dismissal of the complaint and for bail. Both motions were denied. Writs of *habeas corpus* and *certiorari* were then issued and argument was heard in the United States Circuit Court on March 23d, 1903. The writs were dismissed on March 30th, 1903, and papers were at once prepared to take an appeal to this Court, and such appeal was allowed and citations were issued on April 7th, 1903.

On March 31st, 1903, a new warrant was issued which charged the appellant with the same offense as he is charged in the warrant of March 16th, but which, in addition thereto, charged him with having made false entries on the books of the London and Globe Finance Corporation, Limited. The prisoner was arraigned on this warrant and an examination was demanded and was set for April 8th, 1903.

On March 31st, 1903, it was announced on behalf of the demanding government that it would abandon the proceedings instituted under the complaint of March 16th, and that it consented to the discharge of the prisoner from arrest under the warrant of that date. The Commissioner, however, stated that he was without power to discharge the prisoner, and declined to do so.

On April 8th, 1903, it was announced to the Commissioner that an appeal had been taken to this Court and that the citation, as well as the petition for appeal, had been served on the demanding government, and that a motion had been made returnable before this Court of April 13th, for a rule or order advancing the cause and setting it down for a prompt hearing. The counsel for the British Government thereupon renewed his motion for the discharge of the prisoner under the warrant of March 16th, but such motion was denied for lack of power on the part of the Commissioner.

On April 13th, 1903, the motion was made in this court to advance the cause and was granted, no opposition having been made, although a representative of the Department of Justice was present at the presentation of the motion.

On April 15th, 1903, the Commissioner announced that during the pendency of the appeal to this Court

he would not render any decision in the proceedings which were then before him, and that he would make no adjudication on the question as to whether or not the offense as to which the prisoner stood charged was extraditable until this Court should have determined this appeal. The following colloquy then took place:

"MR. UNTERMYER: Now, may I ask, Mr. Commissioner, if your hesitation to hear us now on the question of the extraditability of the offense is based upon the ground that that is to be presented to the Supreme Court?

"THE COMMISSIONER: I wish to have any light the Supreme Court can throw on that subject.

"MR. UNTERMYER: Will you then inquire of the counsel representing the Government whether they propose to present that question?

"THE COMMISSIONER: No, I will not. I consider the complaint is before the Supreme Court, and when they act I will be in a position to decide."

Subsequently Mr. Fox said:

"As this case was taken up at the suggestion and the demand, I might say, of the accused, we were directed to proceed, although there were certain reasons that appeared to us which might make it a little questionable. Notwithstanding that we were directed to proceed, and we have proceeded, under the ruling of the Commissioner, when we were notified that after we had he would do nothing until the opinion of the Supreme Court of the United States, and that he would not take the case for final submission until that time.

"MR. UNTERMYER: Ruling on what, Mr. Fox?

"MR. FOX: When I say 'his ruling,' his announcement, we will put it. Now, the counsel has taken this case to the Supreme Court. He has that right, and nobody objects or criticises in the slightest. Now, if he is able to obtain from the Supreme Court a decision sustaining his views, it may be accompanied by some qualifications and suggestions from that great court that will make it necessary for us to introduce other proof, and as the case is not to be decided until that decision, I cannot see how the accused is prejudiced in the slightest degree,

"THE COMMISSIONER: I understand Mr. Fox to say

he considers his case closed unless something he knows not of occurs.

" MR. UNTERMYER : Then, as at present advised, as I understand it, the complainant's case is closed. That being so, Mr. Commissioner, we very respectfully insist that, upon the proof submitted, the offense is not extraditable, and we ask you to dismiss the proceeding.

THE COMMISSIONER : The Commissioner again refuses to consider that question until the opinion of the Supreme Court is announced upon the matter now pending before it."

* * * * * * *

MR. UNTERMYER : Carrying out that line of action, what does the Commissioner propose to do with the case ?

THE COMMISSIONER : Adjourn the case until the Supreme Court has decided the matter now before it.

MR. UNTERMYER : That might be for months. That might carry it over until next autumn by a division of the Court, and this defendant remain in jail all that time.

THE COMMISSIONER : That is the position your action has placed the defendant in.

MR. UNTERMYER : We certainly had a right to raise the question by *habeas corpus* and to go to the Supreme Court. Now they have put in another complaint. It is their action that has placed the defendant in that position. They have a man arrested upon a complaint, and when we ask to raise the question of the sufficiency of the complaint before the courts, they take out another warrant and make another charge. I do not quite see how it is our action. I can quite see how it is theirs.

THE COMMISSIONER : As long as the proceeding is pending in the Supreme Court, the prisoner cannot complain of being restrained in jail by this proceeding. It is the proceeding in Washington, in the Supreme Court, under which he is directly held under arrest."

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POINTS.

I.

The prisoner having regularly appealed to this Court on a record presenting the questions of the right of extradition and the right to give bail, the jurisdiction of this Court to entertain such appeal is not affected by the fact that the demanding government announced its willingness that he should be discharged under the warrant of March 16th, 1903, its application for the withdrawal of such warrant having been denied by the Commissioner.

The demanding government is not here as an appellant. It is not in a position to review the correctness of the Commissioner's ruling that he could not discharge the prisoner from arrest under the warrant of March 16th. He repeatedly and consistently refused to discharge the prisoner, and declared him to be under arrest by virtue of that warrant.

Not only did he decline to permit the withdrawal of the warrant of March 16th, but he declined to determine the questions arising under the warrant of March 31st because of the pendency in this Court of the present appeal, by which it is sought to have determined questions which will be decisive of all essential propositions which will arise under the warrant of March 31st.

The warrant of March 16th has, therefore, been sustained by the Commissioner and by the United States Circuit Court in the first instance, and the Commissioner has declined, in any manner, to interfere with

that warrant. The appellant comes before this Court a prisoner under this warrant, and asks that the questions presented by the record, which involve the interpretation of the extradition treaties between the United States of America and the United Kingdom of Great Britain and Ireland be passed upon.

He has done no act which precludes this Court from passing on these questions. He has been guilty of no fault, and has initiated no steps which prevent this Court from proceeding to judgment, or which render it impossible to grant him effectual relief.

The expression of a willingness on the part of the demanding government to withdraw the warrant of March 16th, was in the nature of a motion to enter a *nolle prosequi*. But the Commissioner did not permit the warrant to be withdrawn, and it is still in full force.

It is well settled that unless such a motion is allowed by the court or tribunal to which it is addressed, it has no efficacy whatever.

In *United States vs. Schumann (7 Sawyer, 439)* the prisoner was brought before a United States Commissioner for examination upon a charge of having committed a public offence against the laws of the United States. The District Attorney proposed before the examination was completed to dismiss the proceeding. The Commissioner applied to Judges FIELD and HOFFMAN, then holding the Circuit Court, for their opinion as to the power of the District Attorney to do so, and it was decided that he did not possess the power; that on such an examination he attends only as the counsel for the government to present evidence against the accused, and has no control over the course to be pursued.

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Speaking of the powers of the Commissioner, Mr. Justice FIELD said:

"He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offence against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the government and for the accused; and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duties in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government; nor is he subject to any other's control. The district attorney may appear before the commissioner, and attend to the presentation of the evidence—but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the persecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course. While the charge is under investigation, before either the commissioner or the grand jury, the district attorney has no absolute power over the case."

This decision was cited with approval in *U. S. vs. Ebbs, 10 Fed. Rep., 369.*

Certainly the counsel for the demanding government, who does not possess the authority of a District Attorney, has no greater control over proceedings pending before a United States Commissioner than a District Attorney, who is a sworn officer of the United States, would have.

In People vs. McLeod (1 Hill, 465) the power to direct the entry of a *nolle prosequi* was considered, and it was held that the District Attorney was not empowered to *nol. pros.* any criminal charge, or in any

other way discontinue or abandon it, without leave of the Court having jurisdiction to try the offense.

In other words, it was decided that the tribunal before which the case was pending, possessed the power of veto against a *nolle prosequi*.

The *New York Code of Criminal Procedure* contains two sections on the subject, which indicate that the same views still prevail in that State. They are the following:

"671. The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.

"672. The entry of a *nolle prosequi* is abolished, and neither the attorney general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section."

In *State vs. Klock (48 La. Ann.; s. c. 18 So. Rep.. 942)*, it was held that the power of the District Attorney to enter a *nolle prosequi* was subject to two limitations, (1) after the jury has been empaneled and the charge read he cannot discontinue if the defendant insists upon a verdict; (2) after a verdict and refusal to grant a new trial he is without authority to dismiss the prosecution without authority of the Court.

To the same effect are:

Statham vs. State, 41 Ga., 511.
Ex parte Donaldson, 40 Mo., 149.
State vs. Roe, 12 Vt., 93.

II.

The fact that the demanding government is now willing to consent to a discharge of the appellant from custody under the war-

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rant of March 16th, 1903, should not, under the circumstances, deprive him of his right to have the important questions of law which affect his liberty determined on this appeal.

(1) The demanding government is not a party to this appeal.

(2) Its offer amounts to a mere attempt to avoid and postpone the determination of the question of the extraditability of the appellant for the offense charged in the complaint and warrant which are a part of the record and which, so far as the charge of making, circulating and publishing a false account is concerned, is identical with that described in the warrant of March 31st, 1903.

(3) It likewise seeks to postpone indefinitely a determination as to the right of the appellant to be admitted to bail.

(4) The offer of the demanding government does not amount to a consent that the appellant should have judgment on the merits of the controversy which is presented by this appeal.

(5) If these proceedings were now dismissed, and the appellant were required to institute new proceedings under the complaint and warrant of March 31st, it would be impossible to present the case before this Court until the October Term, 1903, and in the meantime he would be kept in custody, unable to obtain a favorable adjudication either on the merits or on his right to be admitted to bail in view of the opinion rendered by Judge LACOMBE.

The affidavit on which the application for a dismissal is made is verified April 22d, 1903, and was only called to the attention of appellant's counsel on April 24th, 1903. In the meantime the Commissioner had declined to permit a withdrawal of the warrant of March 16th; had refused to pass on the merits of the charge described in the warrant of March 31st; the appellant had taken his appeal to this Court, and the cause had been advanced on notice to the demanding government, and stood ready for argument. The appellee has likewise prepared a printed brief on the merits.

To dismiss these proceedings at this stage would be unjust to the appellant and deprive him of substantial rights. To deny the application of the demanding government would in nowise affect its rights, since the assignments of error present for review no other questions than those of the interpretation of the treaty between the United States and Great Britain and of the power of the tribunals below to admit a prisoner, arrested in extradition proceedings, to bail.

Assuming, but not conceding, that this Court could on this state of the record decline to exercise its jurisdiction, it is submitted that following the analogies of courts of law where a plaintiff seeks to submit to a voluntary non-suit, and of courts of equity where a complainant moves for the dismissal of his bill, and the decisions which have been rendered on such applications, the appellant should not at this stage of the case be turned out of court, since he would thereby be deprived of the right of a speedy hearing, and would, as we believe, be subjected to an unwarranted and protracted deprivation of his liberty.

In *Chicago & Alton R. R. Co. vs. Union Rolling*

Mill Co. (*109 U. S., 702*), in a suit in equity, one of the defendants, having answered setting up his particular rights, filed a cross-bill to enforce them, and an interlocutory decree was entered to protect and enforce his rights thus set up. The complainant in the original suit then sought to dismiss his bill under the Thirty-eighth rule, for failure to reply to the plea interposed by another of the defendants. It was held that the complainant could not thus dismiss the bill against the objection of the defendant.

Mr. Justice Woods, speaking for the Court, said:

"The appellants contend that Dumont, the original complainant, had the right at any stage of the case, to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

"It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well-settled exception—namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

"The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed.:

"'After a decree or decretal order the Court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.'

"The same writer, page 794, says, that,

"'After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.'

" 'The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the Lord Chancellor in *Cooper vs. Lewis, 2 Phillips Ch., 181*, as follows:

" 'The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted. It is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff.'

" In *Bank vs. Rose, 1 Rich. Eq. (S. C.), 294*, it was said:

" 'But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted.'

" So in the case of *Connor vs. Drake, 1 Ohio St., 170*, the Supreme Court of Ohio declared:

" 'The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defense, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them, merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill.'

" Chancellor WALWORTH, in the case of *Wall v. Crawford, 11 Paige, 472*, laid down the rule in these words:

" 'Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in

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the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court.'

"See, also, Guilbert v. Hawles, 1 Ch. Cas., 40; Bluck v. Colnaghi, 9 Sim. Ch., 411; Lashley v. Hogg, 11 Ves. Jr., 602; Booth v. Leycaster, 1 Keen's Ch., 255; Biscoe v. Brett, 2 Vesey & B., 377; Collins v. Greaves, 5 Hare, 596; Gregory v. Spencer, 11 Beav., 143; Carrington v. Holly, 1 Dick., 280; Anon., 11 Ves. Jr., 169; Cozzens v. Sisson, 5 R. I., 489; Opdyke v. Doyle, 7 R. I., 461; The Atlas Bank v. The Nahant Bank, 23 Pick., 491; Bethia v. M'Kay, Cheve's Eq. (S. C.), 96; Sayer's Appeal, 79 Penn. St.; Seymour v. Jerome, Walk. Mich. Ch., 356."

In *Stevens vs. Railroads (4 Fed. Rep., 97)*, it was held that the plaintiff would not be allowed to voluntarily dismiss his bill without prejudice to the bringing ing of another suit, unless the circumstances were such that the Court would, upon final hearing, permit the bill to be so dismissed; that it would not be allowed when by such dismissal the plaintiff would prejudice the defendant and deprive him of some substantive right; that this exception was not confined to rights acquired by some order or decree entered in the case, but may arise out of any proceeding in it, and may be based on the nature of the defense, the condition of the pleadings, the agreement of the parties, or any circumstance appearing in the record which shows that it would be inequitable to allow the dismissal.

The opinion proceeds on the authority of *Booth vs. Leycester, (1 Keen, 247, 255)* and *Hooper vs. Lewis (2 Phillips, 177)*.

In *Electric Accumulator Co. vs. Brush Electric Co. (44 Fed. Rep., 602)*, decided by Mr. Justice BROWN in 1890, an application by the complainant to dismiss his suit, which had been pending for several years and in which the defendant sought affirmative relief by

answer but had failed to file a cross-bill, was denied. The opinion of Judge HAMMOND in *Stevens vs. Railroads (supra)* was referred to as "a most satisfactory opinion," and the Court proceeds to say:

"Where defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together; the court remarking that the plaintiff could not dismiss his bill when by so doing he might prejudice the defendant: *Booth v. Leycester, 1 Keen, 247.* Where a general demurrer had been overruled upon argument, and defendant had appealed: *Cooper v. Lewis, 2 Phil. Ch., 178.* After an order to account and a report has been made: *Bethia v. McKay, Cheves Eq., 93,* overruling *Bossard v. Lester, 2 McCord Eq., 419.* Or where a cross-bill was filed to a bill of foreclosure: *Bank v. Rose, 1 Rich. Eq., 292;* the court observing that 'whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.' * * *

"Upon a full examination of all the cases upon this subject we have come to the conclusion that leave to dismiss a bill should not be granted where, beyond the incidental annoyances of a second litigation upon the same subject matter, such action would be manifestly prejudicial to the defendant. In the case under consideration the litigation has been pending for three years and a half. The defendant is entitled under his answer to an affirmative decree declaring the invalidity of the plaintiff's patent, in case it succeeds in establishing the priority of its own. Relying upon this, it has neglected to institute a cross-cause, and to allow this bill to be dismissed would be virtually to shorten the life of its patent for the time this litigation has been pending. Indeed, as the very object of the statute is to save the necessity of two suits it will be manifestly unjust to permit either party to put an end to the litigation by dismissing its own bill."

In *Manufacturing Co. vs. Waring (46 Fed. Rep., 87)*, Judge LACOMBE held that a complainant was not entitled of right to dismiss his bill after the answer is filed,

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setting up that the license to use a patent upon which the suit is brought is fraudulent and void.

In *Western Union Tel. Co. vs. American Bell Tel. Co. 50 Fed. Rep., 662, 664*), the rule is stated by Judge COLT as follows :

"Under that practice (*i. e.*, the English Chancery practice before 1845) the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree; and this has been the general practice both in the federal and state courts. There are, however, certain well recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that the complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances, where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against the second suit ; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill."

In *City of Detroit vs. Detroit City Ry. Co.* (*55 Fed. Rep. 569*), a suit was brought to declare the rights claimed by the defendant under a franchise from the City of Detroit void, and praying that the right of the company to use the city streets be declared ended after 1893. The railway company alleged the validity of its franchise, and asked that the city be restrained from interfering with the operation of the railroads. After the suit had been removed into the Federal Court

from the State Court, in which it had been instituted, the complainant moved to dismiss the bill. The application was denied, Judge TAFT saying:

"It seems hardly fair that after a case has been got ready for hearing and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by dismissal, under which he reserves full power to harrass him by bringing a new bill when he shall choose to do so, on the simple condition, that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures. * * * If we dismiss the bill, it would seem that under the decision in Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S., 702, 3 Sup, Ct. Rep., 594, the cross-bill would fall too; and the question is whether this would prejudice the defendant railway company. We think it would, under the authorities already cited. Moreover, an affidavit has been filed in which it is alleged (and the allegation is not denied) that this litigation has prevented the sale of its bonds, and also that in the short time, during the coming year, if it is to enjoy the franchise it claims, it will have to expend a large amount of money—more than half a million dollars—in the improvement of the streets, and of the motive power of its cars. We think it may, on this state of facts, rightfully say that it would be prejudiced by a discontinuance of this suit. Thereby it would be required to bring another bill to assert the same right to affirmative relief it now claims, and the ordinary delays in litigation would delay the decision on such new bill until after the time when this franchise is said to terminate. It is naturally of paramount interest to it, under the circumstances, to know as soon as possible what its rights are in the streets."

To the same effect is *Hershberger vs. Blewett, 55 Fed Rep., 170.*

In *Lewis vs. Cooper (16 L. J. Ch., N. S., 265)*, it was held that after a defendant has appealed from an order overruling a demurrer in the cause the plaintiff cannot dismiss as of course.

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In *Folger vs. The Robert G. Shaw* (*2 Woodbury & Minot, 537*), where an application to dismiss had been made after an appeal had been taken in the case, Judge WOODBURY, denying the application to dismiss, said:

"The true test seems to be the progress in the case, so that the court have means to decide on the merits. The defendant then has rights and may well insist on a final judgment to avoid further expense and litigation. Thus it often happens in the Supreme Court of the United States on an appeal that the court, when one side does not appear, proceed to hear the other, and render judgment on the merits (*U. S. v. Palmer, 3 Wheat., 626*). And by the thirtieth rule of that court either party can claim a hearing and decision on the merits, because in that court no new testimony or pleadings generally take place, and the case is in a state to be heard and decided on the merits whenever it is entered. Looking to this condition of things as the general test, whether in a court of original or appellate jurisdiction, it settles the question whether of right the plaintiff can be non-suited or not. Nor is a discontinuance allowed, except for special cause, after a rule for judgment on a demurrer or on pleas for like reasons, as then the merits can be decided and the defendant them has gone far enough to claim final judgment on the controversy."

In *Beery vs. Chicago, &c., R. R.* (*6 4Mo., 533*), it was held that a nonsuit cannot be taken in the State court after the proper application has been made by the defendant for the removal of the action to the Federal court.

In *Browning vs. Chrisman* (*30 Mo., 353*), it was held that discontinuance would not be allowed when it would produce any derangement in the rights of the defendants, or subject them to increased difficulties or liabilities.

Whenever a defendant is wrongfully dispossessed of his land by legal process he is entitled to a writ of restitution and an inquisition of damages in that

action, of which the plaintiff is not permitted to deprive him by taking a nonsuit.

Lane vs. Morton, 81 N. C., 38.

The plaintiff will not be permitted to discontinue his suit when it will give him an advantage or tend to vex and oppress the defendant.

Mechanics' Bank vs. Fisher, 1 Rawle, 341.

The only effect of granting the application of the demanding government would be to continue indefinitely the imprisonment of the appellant; to deprive him of the opportunity which is now afforded him of obtaining a prompt interpretation of the treaty, and of his right to bail; to increase his expense; to vex and annoy him; to render it necessary to renew the proceedings, which are ripe for decision.

If the demanding government can thus deprive the appellant of his right to be heard in this Court by the procedure now resorted to, the same tactics may be employed should it for any reason be deemed desirable to withdraw the warrant of March 31st, or any succeeding warrant that may be procured. In other words, the appellant could not have his day in Court without the consent of the demanding government, and only by its grace.

The appellant's procedure has been regular. His resort to the writ of *habeas corpus* to regain his liberty has the highest sanction. He has appealed to this Court, pursuant to statutory authority. He has done nothing to change his status as a petitioner for judicial relief. And yet, because the demanding government—not even the appellee—seeks arbitrarily to interfere with his regular, and orderly proceedings, by an offer, which cannot inure to the appellant's benefit, made

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after the jurisdiction of this Court has attached, it is sought to deprive him of an adjudication by this Court on the merits of the appeal.

III.

It is respectfully submitted that jurisdiction should not be declined.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Appellant's Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

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No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

APPELLANT'S BRIEF IN REPLY TO THE SOLICITOR GENERAL.

SAMUEL UNTERMYER,
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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

APPELLANT'S BRIEF IN REPLY TO THE SOLICITOR GENERAL.

In view of the intervention of the United States and the brief filed in its behalf by leave of the court, the following additional suggestions are with the permission of the court respectfully submitted on behalf of the appellant:

I.

The questions arising under the warrant of March 16 are identical with those that can arise under that of March 31, so far as they are reviewable here, and therefore should now be passed upon.

We agree with the Solicitor General that the ultimate question to be decided here is that of extraditability. However great the mass of evidence that may be presented on

the subject of criminality, this court will not review the weight of evidence, but it will determine whether or not the case comes within the terms of the treaty.

That proposition is presented by the record now before the court, as effectually as though the complaint and warrant were replete with evidentiary allegations. They charge the appellant with the crime of "fraud as a director," in the language of the English statute, and we have not criticised and do not contest the sufficiency of the allegation. We treat it as being ample as a pleading, but say that conceding that in proper legal form it accuses the appellant of a violation of section 84 of 24 and 25 Victoria, chapter 96, there can nevertheless be no extradition for that offense, because it is not, in the language of the treaty, "made criminal by the laws of both countries."

A comparison of the complaint and warrant of March 16 with that of March 31 will show that, so far as form of allegation is concerned, they are modeled on identical lines—one is no better and no worse than the other. So far as substance is concerned, they both charge the appellant with an offense under section 84 in the language of the section, viz., that, being a director of the London and Globe Finance Corporation, he unlawfully made, circulated, and published certain reports and statement of accounts of the corporation which were false, and which he then knew to be false, with intent thereby to deceive and defraud shareholders or members of the corporation, etc. The slight amplification of this language in the complaint and warrant of March 31 does not in any material respect change the nature or effect of the accusation. It describes an offense under section 84 and nothing else.

This offense is either extraditable or it is not. Whether or not it is, can be determined upon the present record as effectually as upon one containing the warrant of March 31.

In the recent case of *Greene and Gaynor*, reported in *Montreal Gazette of August 16, 1902*, to be found in the files of the Department of Justice, the right of extradition on a charge of "conspiracy to defraud" was presented on a writ of *habeas corpus* issued immediately on the arrest of the prisoners on a provisional complaint and warrant.

In addition to charging the offense described in section 84, the complaint and warrant of March 31 also charge the appellant with falsifying books, papers, and writings belonging to the company and with making and concurring in the making of false entries, etc., with intent to defraud, etc. This describes the offense defined by section 83 of the English statute. We claim that it does not create an extraditable crime; but even if did, the fact that two crimes are charged against the appellant should not deprive him of this opportunity of having it determined that he cannot be extradited for one of those crimes, viz., that defined by section 84, and of the privilege of insisting that even should he be extraditable for the other of those crimes, viz., a violation of section 83, that if surrendered for that crime he cannot be tried on the charge of violating section 84. Although it has been stated that the demanding government has presented to the commissioner substantially all of its testimony in support of the complaint of March 31, the appellant, if put to his proof, will find it necessary to bring witnesses from England, and in view of the fact that Judge Lacombe's decision now sought to be reviewed, until reversed, will natu-

rally be followed by any court to which the appellant may apply for the purpose of testing the extraditability of the offenses charged in the warrant of March 31, and the early adjournment of this court will render a hearing before this tribunal impossible before next October, the appellant would be forced to remain imprisoned until then, unless relief can be afforded to him on this appeal.

II.

The crime charged against the appellant does not come within the terms of subdivision 3 of section 611 of the New York Penal Code, and therefore no case for extradition is established even under the appellees' interpretation of the treaty.

The Solicitor General claims that section 84 and the section of the New York Penal Code quoted on page 11 of his brief together make out a case of a "fraud by a director made criminal by the law of both countries," and his argument is addressed to the proposition that nothing more is necessary than that the crime shall be against the laws of the demanding government and against those of the State where the accused is apprehended. He, however, of necessity concedes that the offense charged must at all events be a crime against the laws of that State. He could not well do otherwise.

In re Frank, 107 Fed. Rep., 272.

It is inconceivable that there may be any arrest for a crime within the boundaries of any State or Territory whose particular jurisprudence does not make the act charged

criminal. Hence the least that can be required in any case is that the offense charged shall be made criminal in the jurisdiction where the arrest takes place. This is the very basis of the appellees' contention.

The Solicitor General has not answered our contention that the provision of the New York Penal Code on which he relies does not define a crime which can be described as "the fraud of a director" or any equivalent crime.

(a.) The offense which it creates contains no element of fraud. The English statute makes "fraud" the *sine qua non.*

(b.) It does not require "the intent to deceive and defraud" (*Gardner vs. People, 62 N. Y., 299*). The English crime depends upon the "fraudulent" intent.

(c.) It does not require *scienter* of the falsity of the report on the part of the accused. The English statute makes it essential. The word "knowingly" as used in the New York statute has reference only to concurrence in the making or publishing of the report, and not to knowledge of the falsity of its statements. The English statute uses the phrase "which he shall know to be false."

(d.) It creates an offense of a venial nature and punishes carelessness and inconsiderateness amounting to official misconduct but not to fraud.

An indictment in England charging an offense in the language of the New York Penal Code would be bad. One indicted in New York for the statutory offense in the terms of the code would not be extraditable from England.

Proof in England of the elements of the New York crime would not suffice to make out a case under the English statute. How, then, can it be said that the act of which the appellant is accused "is made criminal by the laws of both countries"?

III.

The appellees fail to give due effect to the qualifying phrase of the treaty upon which we rely, but treat it as surplusage.

The concession of the Solicitor General that in every case under the treaty the offense charged must be a crime under the law of the demanding country and of the State where the arrest occurs establishes as an inevitable carollary the proposition that the words "made criminal by the laws of both countries" have a wider significance than he has given to them, since otherwise they are meaningless. If every crime must be "made criminal by the law of both countries," then why was it necessary in three of the subdivisions of the treaty of 1889 to repeat that phrase, and why was it omitted in the remaining seven subdivisions? The high contracting parties are not to be presumed to have indulged in pleonasm, or to have chosen their language without the deliberation which the very conception of an international treaty implies. On the contrary, they must be considered to have weighed their words. If, therefore, the crimes enumerated in the treaty of 1842 and in the seven subdivisions of the treaty of 1889, which omit the phrase "made criminal by the laws of both countries," where Great Britain is the demanding government, in order

to be extraditable must be criminal by its laws and by those of the State where the prisoner is apprehended, in the three instances where that phrase is employed to qualify the description of the crime, something more is intended than that the act should be made criminal by the laws of the State where the prisoner is found.

We contend that it must be criminal either at common law, or by act of Congress, or, at least, by the general trend and clear preponderance of the legislation of the several States. None of these conditions exist.

This court takes judicial notice of the laws of the several States. Those applicable here have been collated for its convenience in the Appendix to our main brief. The correctness of the digest has not been assailed.

IV.

The absence of congressional legislation creating the crime charged against the appellant is deserving of further emphasis.

It has been shown that it is within the purview of Federal legislation to deal at least with corporations engaged in interstate traffic and with such as are instrumentalities of the Government, and to require of them the making of reports, which if fraudulent and false may be made the basis of a criminal prosecution. It has likewise been pointed out that there has been no such legislation. In the case of national banks, section 5209 of the United States Revised Statutes has been referred to in the appellees' brief, but not in the oral argument. But, for the reasons shown on pages 24–27

of our main brief, it has no application. At most it indicates that so far as there may be an English statute of similar tenor applicable to banks of the same general character, there is one class of fraud of a director when committed with respect to a corporation arising within the description of the national banking act, which is "made criminal by the laws of both countries." The failure to make further provision is significant. The importance attached to national banks may have been the occasion of inserting in the treaty these qualifying words.

The appellees have in their brief referred to section 166 of the English Companies act. That section has no application to the crime charged in the present record. It relates to falsification of books and false and fraudulent entries made with intent to defraud by a director of a company *wound up under that act.* That statute contains provisions for the voluntary and involuntary winding up of corporations. Our bankruptcy act applies to the winding up by involuntary proceedings of practically all corporations other than banks, and has defined a series of crimes which may be committed with respect to the affairs of a bankrupt; yet the crime described in section 166 is not made criminal by Congress. The power existed, but was not exercised. Congress acted advisedly when it failed to make the act criminal by the laws of the country.

V.

The question of bail.

1. It is claimed by the appellees that sections 1014 and 1015 of the United States Revised Statutes must be read together. If read together they indicate the policy of our

Government on the subject of bail; but we do not believe that they must be so read. Section 1014 declares that "for *any* crime or offense against the United States the offender may, by any justice or judge, etc. * * * be arrested and imprisoned, or bailed as the case may be before such court of the United States as has cognizance of the offense." The subject of bail is thus provided for.

Then follows section 1015, which announces that "bail shall be admitted upon *all* arrests in criminal cases where the offense is not punishable by death, and in such cases it *may* be taken by any of the persons authorized by the preceding section (§ 1014) to arrest and imprison offenders. The reference to the preceding section is for the sole purpose of specifying the judicial officers who may act. In the preceding section they had already been authorized to take bail for "any crime or offense against the United States." Why, then, repeat the provision as to bail, unless it was to have reference to any case of arrest in criminal cases in which the process of the United States was employed, as in the cases of extradition or deportation.

2. In the case of Queen *vs.* Spillsbury the crime was committed in the waters of Morocco, an independent government. It is true that the arrest was under the fugitive offenders' act, but the proceeding was practically one of extradition. The language of Mr. Justice Wright which the Solicitor General quotes is merely to the effect that cases arising under that act will not "in all instances" apply as precedents in cases under the extradition acts. That must obviously be due to the fact that extradition treaties some-

times contain provisions differing from those of the fugitive offenders' act.

3. If, as is claimed by the Solicitor General, the law of the State where the accused is apprehended applies not only with respect to the substantive law, but certainly as to procedure, then, since the right to bail is recognized by the New York Code of Criminal Procedure, it must exist in a case of this character.

4. The argument that the contract embodied in the treaty requires our Government to hold one arrested at the instance of the British government without bail is without foundation. The treaty does not so stipulate; neither do considerations of comity. In the past the British government has not in all instances found itself constrained by even the letter of the treaty, and has in many instances given to it a strict interpretation against our Government. We owe no greater obligation of diligence with respect to the custody of offenders against its law than we do against those violating our own.

Respectfully submitted.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Appellant's Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, ET AL.,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appellant's Brief in Reply to Supplemental Briefs Submitted after Argument.

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37466

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, Appellant, vs. WILLIAM HENKEL, United States Marshal for the Southern District of New York *et al.*, Appellees.	No. 661.

Appellant's Brief in Reply to Supplemental Briefs Submitted After Argument.

I.

The comparatively unimportant penal offense under Sub. 3, Section 611 of the Penal Code is not "fraud of a director" within the meaning of the treaty and is not extraditable. Proof of fraud in support of a change under that section would be surplusage.

We agree with the Solicitor General that proof which would satisfy Section 84 of the English Larceny Act

would also make out the offense under Section 611, in the sense in which proof of murder would establish the crime of assault with intent to kill. We do not, however, agree that they are therefore the same offense under different names or that they have anything in common.

A case is made out under Section 611 with less proof than is required to satify the English law. It is not necessary to prove fraud under Section 611, and, therefore, the act is not " fraud of a Director." Fraud is no element of the offense. Section 611 is headed: " *Misconduct of Officers and Employees of Corporations.*"

It reads as follows :

" 611. Misconduct of officers and employees of corporations.—A director, officer, agent or employee of any corporation or joint-stock association who :

" 1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts ; or,

" 2. Concurs in omitting to make any material entry thereof ; or,

" 3. Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false ; or,

" 4. Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected and extracts taken therefrom by any person entitled by law to inspect the same or to take extracts therefrom ; or,

" 5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof ; or,

" 6. Refuses or neglects to make any report or statement lawfully required by a public officer, is guilty of a misdemeanor."

Attention has been called to the title of Chapter XI. in which Secs. 611 is contained, as showing that the offence involves fraud. It will be seen by reference to the twenty-five sections constituting that chapter that the title is misleading. The chapter embraces Secs. 590-614. The earlier sections only deal with frauds. Most of the others do not

Subs. 4, 5 and 6 of Sec. 611 are fair illustrations of offenses in which fraud constitutes no element. A person having the custody of corporate books who (1) neglects to allow them to be inspected and extracts taken; or (2) who omits to disclose the service of an injunction order upon him to his co-directors; or (3) neglects to make any report or statement required by a public officer, is guilty of a misdemeanor.

Sub. 3, Sec. 611, which is the provision relied on as establishing that the fraud of a director is made criminal in New York, does not require a single element of fraud to make out the offense. Whoever knowingly concurs in making or publishing a report which is false violates that provision, in the same way as the person who forgets or neglects to file a report required by law violates sub. 6 of the same section, and is subject to the same penalty, however innocent may have been his motive.

Section 614 of the Penal Code reads as follows:

"A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the Board of Directors, and he remains a director of the corporation for six months thereafter without causing

or in writing requiring his dissent from such violation to be entered on such record or minutes."

Sub. 3 was framed to reach the case of a director who knew or ought to have known that a report was to be made or published and permitted it to be done ("knowingly concurred in making or publishing") without first taking upon himself the duty of ascertaining whether the report was true; its purpose was to hold directors to the performance of their duties. If the director was present at a meeting at which such a report was authorized and he did not dissent from its being made or published; or if he was absent and did not within six months thereafter dissent, if, the report turned out to be false even though he did not know it, he is "deemed to have such a knowledge of the affairs of the corporation as to enable him to determine," and is guilty of a trifling offense punishable very much as would be fast driving or disorderly conduct. He did not properly perform his duties as a director. He ought to have known whether the report was true or false before *permitting* it to be made or published. The statute does not require that he should know the report to be false. If it afterwards appears that the report was in fact false, it was his duty to have dissented from its making or publication *until he knows it to be true.*

It is not possible that this could have been intended as an extraditable offense. There is not an element of fraud required to be proved to constitute the offence. It certainly is not "fraud of a director" within the meaning of the treaty. It may with equal force be claimed that the offenses of neglecting to exhibit corporate books or to disclose the service of an injunction order or to make any report required by a public officer, all of which are contained in the same section, are within the treaty.

The wording of sub. 1 of the same section, in which intent to defraud is in express words made an element of the offense, emphasizes the intention of the

law makers that proof of fraud should not be required to establish an offense under sub. 3.

The Solicitor General very truly says:

"Treaties are necessarily reciprocal engagements."

Would extradition lie from England for an offense under sub. 3, Section 611? *It is not made criminal by the laws of Great Britain.*

Section 84 of the Larceny Act under which the defendant is charged, requires that the report shall not only be knowingly false, but in express terms that it shall have been made with intent to deceive or defraud. The mere false report without the fraudulent intent is not criminal there.

This is met by the suggestion that a lesser offense than the act made criminal in England is criminal in New York, because the mere concurrence in a false report is made criminal in New York without proof of fraudulent intent. True, but every trifling penal act is not extraditable. The fact that the concurring by a director in the making of a report, if it turns out to be false, is made criminal in New York without proof of fraud, whilst it is not criminal in England, does not make the act here "fraud of a Director," within the terms of the treaty.

A comparison of the two statutes discloses that while the crime created by the New York law involves no moral turpitude and is a venial offense of the same character as an act of negligence, the English offense is one which involves moral turpitude, and would, under the decisions of this Court, be treated as an infamous crime.

Section 84 unmistably refers to the fraud of a director; while Section 611 defines an offense which does not come within the category of fraud. Hence, whatever may be said of the character of the offense which it defines, it cannot be denominated "the fraud of a director."

It has been asked whether, in case of a prosecution under Section 611, it could not be proven that the accused had made or concurred in the making or pub-

lishing of a false report with a fraudulent intent. It is believed that such proof would be foreign to the subject matter of the indictment, and, therefore, incompetent. At all events it would not be essential in support of the indictment. The allegation of fraudulent intent, if contained in the indictment, would be treated as surplusage.

Lohman vs. People, 1 N. Y., 379.

The crime created by Section 611, subdivision 3, is a statutory crime. Such an offense was unknown at common law. The essentials of the crime must be found within the statute, and the act of the legislature cannot be enlarged in its scope by the ingenuity of the pleader, or by the character of the proof which may be presented by the prosecutor in substantiation of the statutory offense.

In case of a statutory crime an indictment which follows the language of the statute is sufficient.

U. S. vs. Gooding, 12 Wheat., 460.
Commonwealth vs. Hobbs, 140 Mass., 443.
Trout vs. State, 111 Ind., 499.
Baysinger vs. People, 115 Ill., 419.

Where the offense is *malum prohibitum* and the statute embraces no words providing that the fraudulent intent or other criminal intent constitutes a part of the definition of the offense, it is neither necessary to allege nor to prove the existence of such intent.

This is illustrated by the statutes against adulterations of milk :

Commonwealth vs. Farren, 9 Allen, 489.
Commonwealth vs. Nichols, 10 Allen, 199.

against the sale of intoxicating liquors :

Commonwealth vs. Boynton, 2 Allen, 160.
Commonwealth vs. Goodman, 97 Mass., 117.

against the sale of naphtha under an assumed name :

Commonwealth vs. Wentworth, 118 Mass., 441.

In cases of this character fraudulent intent is not a necessary ingredient of the crime.

People vs. Cipperly, 101 N. Y., 634.
People vs. Kibler, 106 N. Y., 321.
Haggerty vs. St. Louis Ice Mfg. & Storage Co., 40 L. R. A., 151.

In the case last cited the Court said:

"The offense prohibited by section 3902 is a misdemeanor, and in such case the intention of the misdemeanant cuts no figure in the case, since in that class of crimes intention constitutes no element of the offense. It is the act done, and that alone, which violates the law, and the motive which prompts the violation is altogether dehors the crime committed. This point is illustrated by various adjudications respecting the sale of liquors to minors and the marriage of minors, supposing the parties in each case to be of age"

Halsted vs. State, 41 N. J. Law, 552, is a valuable illustration of a similar case.

In the English Act the gravamen of the offense is the fraudulent intent. In the New York statute that element does not exist.

There is nothing strange in the circumstance that the making of a false report with intent to defraud is not specifically made criminal under the New York Penal Code when the entire Act is examined. A person who obtains money or property by means of a false statement is guilty of *larceny.* It is not claimed that the defendant profited by the report in question. A false report which does not result in inducing any one to part with money or property is not made punishable. But the integrity of corporate reports is protected under Section 611, where the element of fraud does not enter. This holds directors to a higher degree of accountability than the English law, but every mere act of negligence, though made penal, does not thereby become fraud and is not extraditable.

Many very serious criminal offenses are not extraditable. Only a small proportion of the hundreds of crimes enumerated in the Penal Code are covered by the treaty. The defendant might well be guilty of violating Section 611 without coming within the English statute. True, if he has violated the English statute, he is also within Section 611, but only in the sense that a man who commits larceny is liable also for conversion. He may be liable for conversion without being guilty of larceny.

II.

Section 514 of the New York Penal Code has no possible bearing on any question now before the Court. The only complaint in the record is that of March 16, for making a false report.

In the brief prepared by Mr. Fox, after the argument in this Court, we are for the first time met with an attempt to support the complaint of March 16th, charging the making of a false report, by reference to the complaint of March 31st, which also charges the making of false entries in a book. That complaint is not part of the record and could not have been. It was not made until more than two weeks after the warrant under review was issued.

March 18th this writ was issued.

March 20th it was argued before Judge LACOMBE.

March 30th it was decided adversely to the appellant.

Making false entries may or may not be an extraditable offense. No such question is before this Court. It is not an answer to our contention that the making

of a false report is not extraditable to urge that something else is.

The discharge of the defendant under the warrant now under review will still leave him to answer that part of the complaint of March 31st charging false entries, if that offense be extraditable.

We submit that this Court will not travel outside the record to determine whether another charge, as to which there has been no hearing or decision, and as to which there is no appeal pending, is or is not extraditable. Nothing is to be gained by such an irregular and unusual proceeding. Whether the making of a false report be an extraditable offense must in any event be decided, even if the defendant be eventually held on the charge of making false entries. He can be tried only for the offense for which he is extradited. The final warrant for his surrender must of necessity designate the charge on which he is surrendered.

If the defendant is discharged upon the warrant now under review, and a case is made out under the warrant of March 31st, then, and not until then, will the bearing and construction of Section 514 of the Penal Code be presented. At this time everything points to that charge being an afterthought. If, however, it be true that proof will really be forthcoming to support it that hardly furnishes a reason for deciding that the making of a false report is extraditable.

III.

Comity as affecting the construction of the treaty.

The Solicitor General makes an eloquent plea for a liberal and, if necessary, a strained construction of this treaty. He would do away with the definition and

rules of construction applicable to other agreements and engagements.

We quote from page 5 of his brief as follows:

"The suggestion is volunteered that in proceedings to extradite for arson, for example, England would recognize our claim, although the strict conditions of the comman law definition had been enlarged in order to extend the remedy in the particular State of the Union where the crime was committed. A higher idea of comity pervades the entire field, and the drift is, I think, to recognize and include under existing treaties statutory redefinitions of old offenses."

We fail to find anything in the history of English jurisprudence or in the recent authorities of the English Courts in extradition cases to support these assertions. We find, on the contrary, a consistent, unyielding adherence to the terms of the treaty engagements, and a refusal to enlarge or extend the obligation. This is so, although in every case that has come under our observation the person whose custody was sought by this country was one of our own citizens—not a British subject. How much further the English Courts would have gone in refusing extradition where it concerned their own citizens it is not necessary to speculate. That there has been no relaxation in the strict interpretation of the treaty since the Windsor case is fairly illustrated by the decisions in the Eno case and in the recent Greene and Gaynor case.

The suggestion that England would extradite for arson for a crime not within the English definition is not supported by a single instance in which Great Britain or any of her colonies has ever allowed extradition for a crime not within its laws. Yet it is here sought to extradite the defendant for an offense which if committed in England would not be punishable there. The defendant either is or is not extraditable under a fair interpretation of the language of the treaty. The English Government is not asking extradition as a favor or on the ground of comity, but as a right under the treaty. Any appeal on the ground

of comity would be addressed to the Executive and not to the Judicial Department. Great Britain has construed various provisions in this treaty, notably in the Windsor case, and she can certainly ask no more than that we adopt her own construction of it. Her position has been just and dignified. She has never, so far as we have been able to learn, sought to curry favor with this country by voluntarily surrendering a person whose offense was not extraditable under the treaty. The responsibility of a departure from the terms of the contract must rest with the Executive Department; it is not within the province of the judiciary to enlarge the treaty.

Terhuden vs. Ames, 184 U. S., 289.

IV.

The allowance of bail as affecting our treaty obligation.

Much has been said as to our obligation under the treaty to surrender the offender, as a reason for taking from the Courts the power to allow bail in all such cases.

There can be no complaint of laxity in the discharge of our treaty obligations if we apply to the offender the same rules of procedure that would be applicable to our own citizens.

The evidence of criminality is to be such as, according to the laws of the place where the person is found, would justify his apprehension and commitment if the offense had been there committed. The procedure is presumably to be governed by the laws of that place. The contention that in the absence of statutory authority there is no power in the Courts in the general administration of justice, to allow bail, is not conceded.

If the judicial discretion is exercised in the administration of justice in an extradition case, in the same way in which it would ordinarily be exercised in the administration of justice in dealing with our own citizens, we will have done all that can possibly be required of us.

No reason has been assigned for inflicting cruel and inhuman punishments in order to satisfy a conception of treaty obligations more fancied than real. It is often times more easy than just to take an exalted and exaggerated view of moral obligations.

It is argued that the concluding clause of the treaty which provides that "if, after the hearing, the evidence is deemed sufficient to sustain the charge, it shall be the proper duty of the Magistrate to certify the evidence to the executive authority, and that a warrant may issue for the surrender of such fugitive," implies that bail shall not be allowed at any stage of the proceedings. We submit that if there is any presumption created by this language, it is quite to the contrary when read in connection with the preceding clauses. We are not now dealing with the case of a defendant who asks to be admitted to bail *after a surrender warrant has issued*. Whether or not bail would then be allowed is a different question, although even in that case we think the *power* to allow bail exists.

The question here is whether, pending a hearing on charges, there is a power to allow bail. As to that proposition we say that the power to hear the evidence and determine its sufficiency implies the incidental power to deal with the custody of the defendant meantime in the same manner as though the offense had been committed here.

The Right to Bail.

The Solicitor-General has cited *Gorsline's Case (21 How. Pr., 85)* in support of the proposition that, where an offender has been arrested on a warrant in

one county to be taken to another in which he has been indicted, he cannot be admitted to bail in the county where he has been arrested, because he has not been committed, and argues that this is parallel to an arrest in extradition proceedings.

An examination of the case shows, however, that the decision did not involve the power of the Court to admit to bail, but simply the interpretation of a statute regulating the subject of bail.

The case cited has been limited, if not overruled, by the Court of Appeals in *People vs. Clews* (*77 N. Y., 39*), where it was held that one arrested upon a warrant after indictment may be admitted to bail by a Justice in a county where he is arrested, although the indictment was found in another county. The language of Judge FOLGER is quite apposite :

" Surely it is fair to the citizen, and not harmful to the State, and hence, not hostile to public policy, that one indicted in a county remote from his home, and arrested elsewhere, while the court is not in session, which alone may give him a speedy trial, or, as a court, let him to bail, should have a ready means of giving bail in his own vicinage."

It is also urged on behalf of the appellee that the law does not allow sureties to retake a prisoner who has been admitted to bail should he escape into another State. This observation is at war with the decisions of this Court.

In *Taylor vs. Taintor (16 Wall., 371)*, Mr. Justice SWAYNE said :

" When bail is given the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their right in person or by agent. *They may pursue him into another state;* may arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is

needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. In 6 Modern it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same."

In *re Von der Ahe (85 Fed. Rep., 959)* the petitioner had given bail in Pennsylvania. His sureties undertook to seize him in Missouri and remove him to Pennsylvania on the authority of *Taylor vs. Taintor (supra)*. It was decided that this could be done.

The principle was likewise applied in *Cosgrove vs. Winne (174 U. S., 64)*, where a prisoner extradited from Canada to Michigan, who had given bail and thereafter returned to Canada, was held not subject to arrest for a non-extraditable offense while voluntarily at Detroit before the time fixed for trial, he being deemed in the actual custody of his sureties, and hence undergoing imprisonment.

In addition to the Chinese deportation cases which have been cited in our main brief on the subject of bail, we call attention to the fact that it has been usual in cases of that character to allow bail pending an appeal to this Court, and that among the cases in which such bail was allowed were the following:

In re Li Sing, 180 U. S., 486.
U. S. vs. Mrs. Gue Lin, 176 U. S., 459.
U. S. vs. Wong Kim Ark, 169 U. S., 649, 652.
Chin Back Kan vs. U. S., 185 U. S., 213.

In the last of these cases bail was taken by Mr. Justice PECKHAM.

These cases are the more in point in view of the fact that there was no provision in any of the Chinese exclusion acts on the subject of bail prior to 1893.

By section 2 of the act of November 3, 1893, which related solely to deportation in cases of non-registration, it was provided:

"Such order of deportation shall be executed by the United States Marshal of the district within which

such order is made, and he shall execute the same with all convenient dispatch ; and pending the execution of such order such Chinese person shall remain in the custody of the United States Marshal *and shall not be admitted to bail.*"

The fact that in the case provided for in the statute it was deemed necessary to make an express provision prohibiting admission to bail is a strong argument in favor of the inherent right to admit to bail in the absence of such prohibitory language.

Notwithstanding the express provision of the Act of 1893, Chinese prisoners in cases other than those of deportation for non-registration have been admitted to bail, as is indicated by the cases to which reference has been made.

Respectfully submitted,

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Appellant's Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 25 1903
JAMES H. McKENNEY,
Clerk.

No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

BRIEF FOR H. B. M. CONSUL GENERAL AT NEW YORK, APPELLEE.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING WRITS OF HABEAS CORPUS AND CERTIORARI.

CHARLES FOX,
Of Counsel for Appellee, H. B. M. C. General.

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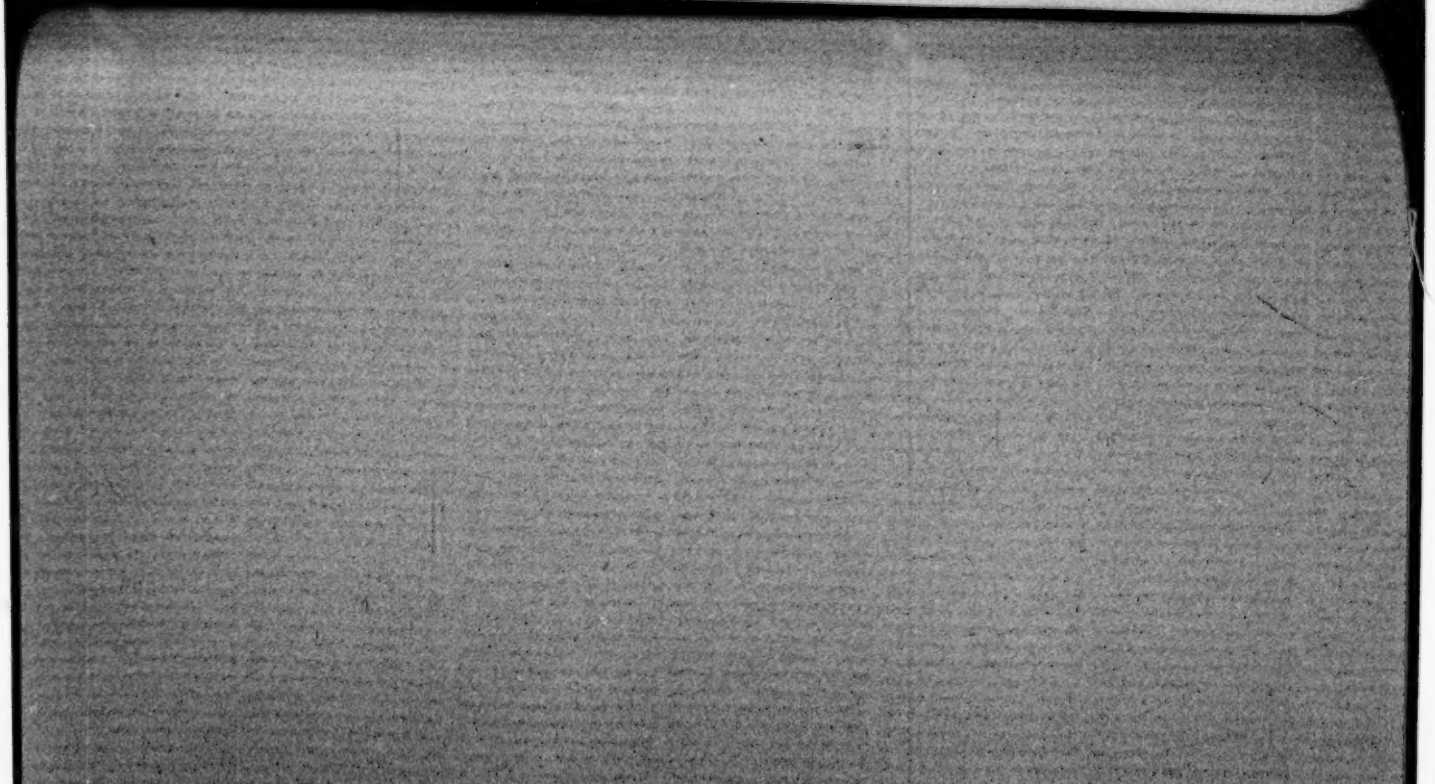

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Supreme Court of the United States.

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WHITAKER WRIGHT, APPELLANT,

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WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

Brief for H. B. M. Consul General at New York, Appellee.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING WRITS OF HABEAS CORPUS AND CERTIORARI.

STATEMENT.

Proceedings for the extradition of the appellant were instituted by the appellee under the supplementary treaty between the United States and Great Britain (26 U. S. Statutes at Large, p. 1508), before Commissioner Alexander, an United States commissioner and also a commissioner especially ap-

pointed to act in extradition proceedings, for the extradition of the appellant for an offense charged as fraud as a director of a company, being embodied within subdivision 4 of article I of the said supplementary treaty, which reads, "Fraud "by a bailee, banker, agent, factor, trustee or director, or "member or officer of any company, made criminal by the "laws of both countries."

The complaint (p. 8) upon which the warrant of apprehension of the appellant was issued charges him with, in the month of October, 1899, and in the month of December, 1900, within the jurisdiction of the demanding government, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully making, circulating, and publishing certain reports and statements of account of the said corporation which were false, he then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the appellant was a fugitive from the justice of the demanding government, and was then within the territory of the United States; that the crime of which he was in the complaint charged was an offense within the treaty between the United States and Great Britain, and that a warrant had been issued in England for the apprehension of the appellant for the offense charged. This complaint was made upon information and belief, and the appellee states that his information and belief are based upon messages received by cable from His Majesty's Secretary of State for Foreign Affairs and directing the appellee to apply for a provisional warrant under the treaty for extradition between the United States and Great Britain. This complaint was sworn to before Commissioner Alexander on

the 16th day of March, 1903, the appellant having arrived at the port of New York from France the day before (Sunday), and the complainant states that he has cabled to the Foreign Secretary of his government for fuller details as to the crime, and that, in order that the appellant might be detained pending the arrival of such information, a provisional warrant was asked for.

A warrant upon this complaint was issued, the appellant arraigned, and an adjournment taken to March 18.

On March 17 a new complaint was prepared, giving with greater detail the facts constituting the offense charged against the appellant, and a warrant upon this complaint was issued, but was never executed, owing to the illness of the defendant.

Upon the 18th day of March, the time to which the proceedings had been adjourned, the appellant was unable to attend, owing to illness, and his counsel moved to dismiss the complaint upon the ground of its insufficiency, and also made a motion for his enlargement on bail (p. 10). The motion for the dismissal of the complaint was denied at the time it was made, and the motion to admit to bail was held by the commissioner for further consideration, and on March 20th he denied the application on the ground of want of power (p. 10).

The appellant's illness being reported to the appellee to be continued, the warrant obtained on March 17 was not executed before the writs of *habeas corpus* and *certiorari* were obtained (p. 6). Pending the disposition of these writs, the warrant of March 17th could not legally be executed, and after the hearing and decision by the United States Circuit Court an order was entered on March 30 dismissing the writs and

remanding the appellant to the custody of the United States Marshal (p. 13).

On March 31, a new complaint was made and sworn to before Commissioner Alexander, including not only the facts constituting the offense as stated in the complaint of March 16, but additional facts; and presented with and accompanying the complaint were the information and complaint and depositions upon which the warrant referred to in the complaint of March 16 was issued, and also a copy of the warrant itself, all of these papers being duly certified under the act of Congress of August 3, 1882.

Upon this complaint a warrant was issued, and the proceedings having been adjourned to that day, an announcement was made on behalf of the appellee that he would abandon further proceedings under the complaint of March 16 and consent to the discharge of the prisoner from arrest under the warrant of March 16 and proceed under the complaint of March 31.

The commissioner held that, as the proceedings under the warrant of March 16 had been carried into the circuit court by a writ of *certiorari*, he was without power to discharge the prisoner under such warrant.

On behalf of the appellee the commissioner was notified that an order had been entered the day before, on March 30, dismissing the writs of *certiorari* and *habeas corpus* and remanding the prisoner to the custody of the marshal.

Counsel for the appellant then stated that papers were then being prepared on behalf of the appellant for the purpose of removing the case to this court, and that an application was to be made to advance the cause to a speedy hearing. Upon this statement the commissioner held that, pending

such proceedings, he was without power so dismiss the complaint of March 16 and discharge the prisoner.

The appellant was arrested under the warrant issued under the complaint of March 31. The further hearing was adjourned to April 8. On that day counsel for the appellant stated that an appeal had been allowed to this court, whereby the questions involved on the hearing on the writ of *habeas corpus* and on the *certiorari* proceedings were to be reviewed by this court; that citation had been duly issued and served, and that a motion would be made, returnable in this court on the 13th day of April, for a rule or order advancing the cause and setting it down for a prompt hearing.

Counsel for the demanding government renewed his motion for the discharge of the appellant under the complaint of March 16, and repeated his former announcement that the demanding government would not proceed further under that warrant or complaint.

The motion to discharge the appellant under the warrant of March 16 was again denied, for the claimed lack of power on the part of the commissioner, and the commissioner stated: "In view of the position of counsel for the prisoner, "and the waiver by them of any objections to proceeding, "by reason of the pendency of the proceedings under the "writ of error, the demanding government should proceed "with its case under the complaint of March 31." Under this ruling the demanding government has introduced evidence in support of the charges referred to in that complaint.

The complaint of March 16 and the proceedings thereunder are no longer sought to be continued by the demanding government. The warrant of March 16 was intended

to be simply, as stated in the complaint, a provisional warrant, to obtain the apprehension of the appellant and to prevent his escape. The only proceedings under which the demanding government seeks the extradition of the appellant are those that were instituted by the complaint of March 31. A motion to admit the appellant to bail has been made in the proceedings under the complaint of March 31, and denied by the commissioner for want of power.

The motion before the commissioner for a dismissal of the complaint of March 16 was made upon the ground that the complaint did not state that the offense charged was made criminal by the laws of both countries, although before the motion was made it was stated to counsel that the laws which were claimed by the demanding government to make the offense criminal by the laws of both countries were sections 83 and 84 of chapter 96, 24 and 25 Victoria, and subdivision 3 of section 611 of the New York Code of Civil Procedure.

We submit that, the demanding government having abandoned all proceedings under the complaint and warrant of March 16, they should no longer be considered as pending; but if it be held that for the purposes of this appeal those proceedings are still in existence, we will proceed to treat the questions as though no subsequent complaint had been made or warrant obtained.

POINTS.

I.

NO EXAMINATION HAVING BEEN COMMENCED PRIOR TO THE PROCEEDINGS ON HABEAS CORPUS NOW HERE FOR REVIEW, THIS COURT WILL CONFINE ITS INQUIRY TO THE QUESTION OF JURISDICTION OF THE COMMISSIONER.

Terlinda *vs.* Ames, 184 U. S., 270.

In this case the court says:

"The settled rule is that the writ of *habeas corpus* cannot "perform the office of a writ of error, and that, in extradi- "tion proceedings, if the committing magistrate has juris- "diction of the subject-matter and of the accused, and the "offense charged is within the terms of the treaty of extra- "dition, and the magistrate, in arriving at a decision to "hold the accused, has before him competent legal evidence "on which to exercise his judgment as to whether the facts "are sufficient to establish the criminality of the accused for "the purposes of extradition, such decision cannot be re- "viewed on *habeas corpus* (Ornelas *vs.* Ruiz, 161 U. S., 502, "508, and cases cited; Bryant *vs.* United States, 167 U. S., "104).

"The statute in respect of extradition gives no right of "review to be exercised by any court or judicial officer, and "what cannot be done directly cannot be done indirectly "through the writ of *habeas corpus*. The court issuing the "writ may, however, 'inquire and adjudge whether the "'commissioner acquired jurisdiction of the matter, by con-

"'forming to the requirements of the treaty and the stat-
"'ute; whether he exceeded his jurisdiction; and whether
"'he had any legal or competent evidence of facts before
"'him, on which to exercise a judgment as to the crim-
"'inality of the accused. But such court is not to inquire
"'whether the legal evidence of facts before the commis-
"'sioner was sufficient or insufficient to warrant his con-
"'clusion.' Blatchford, J., *In re* Stupp, 12 Blatch., 501;
"Ornelas *vs.* Ruiz, 161 U. S., 508."

II.

THE COMMISSIONER HAD JURISDICTION TO ISSUE THE WARRANT UPON THE COMPLAINT MADE BY THE APPELLEE.

So much of section 5270 of the U. S. Revised Statutes as is applicable to the proceedings for the extradition of the appellant reads as follows:

"Whenever there is a treaty or convention for extradition
"between the Government of the United States and any for-
"eign government, any justice of the Supreme Court, circuit
"judge, district judge, commissioner, authorized so to do by
"any of the courts of the United States, or judge of a court
"of record of general jurisdiction of any State, may, upon
"complaint made under oath, charging any person found
"within the limits of any State, district, or Territory,
"with having committed within the jurisdiction of any
"such foreign government any of the crimes provided
"for by such treaty or convention, issue his war-
"rant for the apprehension of the person so charged,
"that he may be brought before such justice, judge or com-

"missioner, to the end that the evidence of criminality may "be heard and considered. If, on such hearing, he deems "the evidence sufficient to sustain the charge under the pro- "visions of the proper treaty or convention, he shall certify "the same, together with a copy of all the testimony taken "before him, to the Secretary of State, that a warrant may "issue upon the requisition of the proper authorities of such "foreign government, for the surrender of such person, ac- "cording to the stipulations of the treaty or convention; and "he shall issue his warrant for the commitment of the per- "son so charged to the proper jail, there to remain until such "surrender shall be made."

The complaint, under oath (p. 4), charged the accused, while a director of a corporation, with having, at times and at places mentioned, within the jurisdiction of the demanding government, committed the crime of fraud, as a director of a named company, in unlawfully making, circulating, and publishing certain reports and statements of account of the said corporation, which were false, and which at the time the appellant knew were false, with intent thereby to deceive and defraud stockholders or members of the said company.

The crime of fraud as director of a company is one of the offenses enumerated in the supplementary treaty, which must be made criminal by the laws of both countries. It was not necessary to state or refer by chapter or section to the laws of the foreign country or to the laws of this country in the complaint. That was a matter of proof in the course of the examination and need not of necessity be included in the complaint. The complaint contained the statement that the crime charged was an offense within the treaty, and that

statement includes and carries with it without specific statement to this effect that this offense is made criminal by the laws of both countries. If it was not made criminal by the laws of both countries, then it was not within the treaty. The complaint does state, however, that a warrant had been issued in England for the apprehension of the accused for the offense charged, and this was certainly equivalent to any statement that could have been made in the complaint that it was an offense that was made criminal by the laws of England, as no warrant could have been issued except for an offense that was criminal by the laws of England. As the court will take judicial notice of the laws of this country, it was not therefore necessary in the complaint to refer to the particular laws of this country.

A complaint in an extradition case need not be as precise, technical, and formal as an indictment. It is sufficient if it appears that a treaty offense is meant to be charged.

Rice *vs.* Ames, 180 U. S., 371.
Re Roth, 15 Fed. Rep., 507.
Re Farez, 7 Blatch., 48.
Re Sterneman, 77 Fed. Rep., 576.
Re Heinrich, 5 Blatch., 414, 460.

All that is required is to set forth clearly the substance of the offense charged, so that the court can see that one or more particular crimes enumerated in the treaty are alleged to have been committed.

Re Adutt, 55 Fed. Rep., 376.
Re Grin, 112 *id.*, 790.

III.

THE COMPLAINT COULD BE MADE UPON INFORMATION AND BELIEF.

The appellee stated in his complaint the basis of his information and belief; that he was the representative of the demanding government, and that the sources of his information were messages received from the foreign secretary of his government. As was said in *In re* Sterneman, *supra*, "the "complaint may in some instances be upon information and "belief. The exigencies may be such that the criminal may "escape punishment unless he is promptly apprehended by the "representatives of the country whose law he has violated."

Complaints made upon information and belief were sustained in *Re* Farez, 7 Blatch., 343; *Re* Kane, 6 Fed. Rep., 34.

In Rice *vs.* Ames, *supra*, Mr. Justice Brown, in delivering the opinion of the court, says: "We do not wish, however, "to be understood as holding that in extradition proceedings "the complaint must be sworn to by persons having actual "knowledge of the offense charged. This would defeat the "whole object of the treaty, as we are bound to assume that "no foreign government possesses greater power than ours to "order its citizens to go to another country to institute legal "proceedings. This is obviously impossible."

We do not understand a complaint upon information and belief to be condemned under the last-cited case, provided the sources of the information and the grounds of the belief are shown and it appears that they justify the statements contained in the complaint.

IV.

THE OFFENSE CHARGED IN THE COMPLAINT IS MADE CRIMINAL BY THE LAWS OF BOTH COUNTRIES.

GREAT BRITAIN.

Chapter 96 of 24 and 25 Victoria, sections 83 and 84, which are as follows:

83. "Whosoever, being a director, manager, public officer, "or member of any body corporate or public company, shall, "with intent to defraud, destroy, alter, mutilate, or falsify any "book, paper, writing, or valuable security belonging to the "body corporate or public company, or make or concur in the "making of any false entry, or omit or concur in omitting "any material particular, in any book of account or other "document shall be guilty of a misdemeanor, and being con- "victed thereof shall be liable, at the discretion of the court "to any of the punishments which the court may award as "hereinbefore last mentioned."

84. "Whosoever being a director, manager, or public officer "of any body corporate or public company shall make, circu- "late, or publish or concur in making, circulating, or publish- "ing any written statement or account which he shall know "to be false in any material particular, with intent to deceive "or defraud any member, shareholder, or creditor of such "body corporate or public company, or with intent to induce "any person to become a shareholder or partner therein, or to "intrust or advance any property to such body corporate or "public company, or to enter into any security for the benefit "thereof, shall be guilty of a misdemeanor, and, being con-

"victed thereof, shall be liable, at the discretion of the court, "to any of the punishments which the court may award, as "hereinbefore last mentioned."

Companies Act of 1862, 25 & 26 Vict., chapt. 89, s. 166.

"If any director, officer, or contributory of any company "wound up under this act destroys, mutilates, alters or falsi- "fies any books, papers, writings, or securities, or makes or is "privy to the making of any false or fraudulent entry in "any register, book of account or any other document be- "longing to the company with intent to defraud or deceive "any person, every person so offending shall be deemed to "be guilty of a misdemeanor, and upon being convicted "shall be liable to imprisonment for any term not exceeding "two years, with or without hard labour."

UNITED STATES.

Section 5209 of the United States Revised Statutes reads: "Every president, director, cashier, teller, clerk or agent of "any association, who embezzles, abstracts or wilfully mis- "applies any of the moneys, funds or credits of the associa- "tion, or who, without authority from the directors, issues "or puts in circulation any of the notes of the association, "or who, without such authority, issues or puts forth any "certificate of deposit, draws any order or bill of exchange, "makes any acceptance, signs any note, bond, draft, bill of "exchange, mortgage, judgment or decree, or who makes "any false entry in any book, report or statement of the asso- "ciation, with intent, in either case, to injure or defraud the "association or any other company, body politic or cor-

"porate, or any individual person, or to deceive any officer "of the association, or any agent appointed to examine the "affairs of any such association; and every person who, "with like intent, aids or abets any officer, clerk or agent "in any violation of this section shall be declared guilty of "a misdemeanor, and shall be imprisoned not less than five "years nor more than ten."

This section applies to and is under the title of national banks, which are the only private corporations that come under the laws of the United States.

The 10th article of the treaty between the United States and Great Britain (8 U. S. Stat. at Large, p. 576) reads as follows:

"Art. 10. It is agreed that the United States and her "Britannic Majesty shall, upon mutual requisitions by them, "or their ministers, officers or authorities, respectively made, "deliver up to justice, all persons who, being charged with "the crime of murder, or assault with intent to commit mur- "der, or piracy, or arson, or robbery, or forgery, or the utter- "ance of forged paper, committed within the jurisdiction of "either, shall seek an asylum, or shall be found within the "territories of the other; provided, that this shall only "be done upon such evidence of criminalities, accord- "ing to the laws of the place where the fugitive or "person so charged, shall be found, would justify his "apprehension and commitment for trial, if the crime "or offense had there been committed; and the respective "judges and other magistrates of the two governments shall "have the power, jurisdiction, and authority, upon complaint "made under oath, to issue a warrant for the apprehension "of the fugitive or person so charged, that he may be brought

"before such judges or other magistrates, respectively, to the "end that the evidence of criminality may be heard and con- "sidered; and if, on such hearing, the evidence be deemed "sufficient to sustain the charge it shall be the duty of the "examining judge or magistrate, to certify the same to the "proper executive authority, that a warrant may issue for "the surrender of such fugitive. The expense of such ap- "prehension and delivery shall be borne and defrayed by "the party who makes the requisition, and receives the "fugitive."

It will be seen that the surrender "shall only be done "upon such evidence of criminality as, according to the "laws of the place where the fugitive or person so charged "shall be found, would justify his apprehension and com- "mitment for trial if the crime or offense had been there "committed."

It has been held, but does not yet seem to have had the approval of this court (although it was presented in Grin vs. Shine, 187 U. S., 181), that this treaty, by its terms, determines and defines upon what evidence surrender shall be granted, viz., upon such evidence of criminality as, according to the place—that is, so far as this particular proceeding is concerned, the State of New York—would justify the apprehension and commitment for trial if the offense had been there committed.

In support of the view that the laws of New York, after having established the laws of England, are to govern this proceeding, we refer to volume 4, Opinions of the United States Attorney General, 330.

Re Farez, 7 Blatch., 357.

Re Wadge, 15 Fed. Rep., 865.

Re Clarkson, 34 Fed. Rep., 533.

In re Farez, *supra*, the accused was charged with the crime of forgery, under the treaty between Switzerland and the United States (11 U. S. Stat. at Large, 593 and 594). Judge Blatchford in that case says: "The 13th article of that treaty "provides that the person charged with the crime shall be "delivered up only when the fact of the commission of the "crime shall be so established as to justify his appre- "hension and commitment for trial, if the crime had been "committed in the country where such person shall be "found. Applied to this case, this provision requires "that in order to warrant the commitment of the party "for trial, the same evidence shall be required of the "fact of the commission of the crime in Switzerland, as "would be required of the fact of the commission of the like "crime if it had been committed here. The good sense of "this provision requires, that the fact of the commission of "the crime shall be established in such manner and accord- "ing to such forms of proceedings as would be required, if "the crime had been committed in the country where the "person shall be found.

"The word 'country' necessarily, under our form of gov- "ernment, in carrying out the provision of the convention, "means the special political jurisdiction that has cognizance "of the crime."

Under the British extradition act of 1870 (33 and 34 Viet., c. 52), providing for the surrender of fugitives to foreign States, the first schedule provides "that the following list of "crimes is to be construed according to the law existing in "England or in a British possession (as the case may be) of "the date of the alleged crime, whether by common law or "by statute made before or after the passing of this act.

* * * * * * *

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"Fraud by a bailee, banker, agent, factor, trustee, or a "director or member or public officer of any company, made "criminal by an act for the time being in force."

The contention made on behalf of the appellant is that there is no law of the United States which makes an offense similar to that alleged to have been committed by the appellant a crime. We submit that section 5209 of the United States Revised Statutes shows that acts similar to those charged against the appellant if committed by a director of a national bank would be a crime; but this subdivision 4 of article I of the supplementary treaty of 1889 also includes fraud by a bailee, banker, agent, factor, and trustee, made criminal by the laws of both countries, and as it must be conceded that there is no law of the General Government of the United States that makes such offenses last named criminal, it requires a determination of the intention of the high contracting parties when entering into this treaty. In respect to these offenses it must be assumed that the distinguished representatives of their respective countries who concluded this treaty were well aware that there was no general law of the United States covering these offenses except the one cited in respect to national banks. What was their intention in making this provision? When they referred to the laws of both countries, did they mean that it should simply apply to the statute laws of Great Britain and the laws contained in the statutes of the United States? Can it be assumed, in considering the purposes of this treaty and the character of the offenses referred to in this subdivision, that they intended to restrict it or make it subject to such a narrow construction as the appellant would have applied to it? Can it be suggested that the

Government of the United States entered into this treaty, so far as the particular offenses in this subdivision are concerned, knowing that it could not carry it out by reason of the absence of a general law of the United States made applicable to them, and that it could not enforce this provision of the treaty by reason thereof? What must be considered to be the object of this treaty was to give all the States, dominions, colonies, or possessions forming a part of the countries of the high contracting parties an opportunity to obtain the extradition of a person committing one of these crimes who was found within the jurisdiction of any State, dominion, colony, or possession of the other; the fact, however, to appear before surrender that the offense charged against any one of these particular classes of offenders should be a crime in the country, or State, dominion, colony, or possession thereof that he has fled from, and also in the country, or the State, dominion, colony, or possession thereof in whose jurisdiction he is found.

A treaty is to be interpreted liberally and in such manner as to carry out its manifest purpose.

Tucker *vs.* Alexandra, 183 U. S. R., 424.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and force of reasoning which we apply to the interpretation of private contracts (vol. I, Kent's Comm., 174).

In Grin *vs.* Shine, decided on December 1, 1902, and reported in 187 U. S. R. (advance sheets), page 181, it is held

that, "treaties of extradition should be faithfully observed and "interpreted with a view to fulfill our just obligations to other "powers, without sacrificing the legal or constitutional rights "of the accused, and that in the construction and carrying "out of such treaties the ordinary technicalities of criminal "proceedings are applicable only to a limited extent. The "foreign powers are not expected to be versed in the niceties "of our criminal laws, and proceedings for a surrender are "not such as put in issue the life or liberty of the accused. "They simply demand of him that he shall do what all good "citizens are required and ought to be willing to do, viz., sub-"mit themselves to the laws of their country; and where the "proceeding is manifestly taken in good faith, a technical "non-compliance with some formality of criminal procedure "should not be allowed to stand in the way of a faithful dis-"charge of our obligations. Presumably, at least, no injustice "is contemplated, and a proceeding which may have the effect "of relieving the country from the presence of one who is "likely to threaten the peace and good order of the commu-"nity is rather to be welcomed than discouraged."

Under the laws of the State of New York, where the appellant was found and apprehended, the offense charged is a crime, the same as in England, and we contend that we have the right to hold him in these extradition proceedings, under this treaty, the law of the State of New York being a law of this country. (Opinion, *Lacombe*, J., p. 11.)

The Penal Code, section 611, provides: "A director, agent "or employee of any corporation or joint stock association "who * * * (3) knowingly concurs in making or pub-"lishing any written report, exhibit or statement of its af-

" fairs or pecuniary condition, containing any material state-
" ment which is false * * * is guilty of a misdemeanor."

Subdivision 4 of article I of the supplementary treaty of 1889 was intended to embrace within it certain crimes which, by the laws of the two countries, might not be called under the same name, so that every fraud committed by any of the persons within that subdivision, which was a crime under the laws of both countries, should come within that provision.

In a number of treaties between Great Britain and other countries, copies of them being contained in and appended to Clarke on Extradition, 1888, this provision, " made criminal by the laws of both countries," is contained.

These words, " made criminal by the laws of both countries," as applicable to extradition treaties, have received the construction of courts in Great Britain.

In *Re* Arton, No. 2, volume I, Q. B. D., 1896, the prisoner had been committed under the treaty between Great Britain and France for a number of offenses within the treaty, and among them one offense described as " faux en ecritures de commerce " (falsification of accounts), and a committal was made upon the argument of a writ of *habeas corpus*, that under the law of England the accused was not guilty of forgery; that the falsification was not in the order of committal described as committed by Arton as a director, officer, or member of a public company, or as a clerk, officer, or servant, which would be necessary to constitute falsification a crime according to English law; and that, even if the order of committal were amended in this respect, he could not properly be committed for falsification on the ground that such falsification was not a forgery under the English law. The court held that if the acts of

the accused established a crime under the laws of both countries and within the treaty for extradition, it was not necessary that such crime should be called by the same name or under the same head. It was sufficient if it be a crime under the laws of both countries and within the treaty; and that treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent.

The same construction of the treaty between Great Britain and France, that a crime need not bear the same name to bring it within the treaty, if it was criminal by the laws of both countries, was also held in *Re* Bellecontre, 17 Cox, C. C., 253, and *Ex parte* Piot, 15 Cox, C. C., 208.

Re Windsor, 6 Best & S., 522, upon which the appellant lays stress, does not justify the conclusion he seeks to have reached here, that by reason of the decision in that case the appellant cannot be extradited. What the learned justices in that case held was that the evidence did not show the crime of forgery under the laws of England, or under the general laws of the United States, and that, although the facts might, by the laws of New York, be defined as forgery, it did not make it so under the laws applicable to common-law forgery; and the court substantially held that, as the crime charged was not a forgery when the treaty of 1842 was entered into, it could not be brought within the treaty by a subsequent statutory law of a particular State of this country. The error which the learned justices in that case apparently fell into was that there was a general law of the United States covering the crime of forgery. We know that this is not so, and never has been; that the laws of the particular

State define what are crimes within their particular jurisdictions.

In Benson *vs.* McMahon, 127 U. S. R., 457, it is stated, "This court has frequently decided there are no common-"law crimes of the United States. In very few of the States "are there common-law crimes remaining as subject of "punishment at the time when this treaty was made. "Most every State in the Union has recast her criminal law "by the enactment of statutes in such a mode that the com-"mon law is now only appealed to as an aid to the defini-"tion of crime."

In Moore on Extradition, section 430, extradition cases in Canada are referred to, where surrender was sought to the United States for crimes of forgery, and the case of *Re* Windsor, *supra*, was endeavored to be used as an authority to prevent the surrender of fugitives to the United States. It was stated by the Canadian courts that an attentive reading of *Re* Windsor must assure every one that the learned justices who decided it did not have their attention called to the fact that under the Constitution of the United States there could be no Federal law against the crime in that case charged.

The case of Windsor differs very much from the case at bar. Giving that case the construction that the appellant would have it bear, it simply holds that the facts alleged did not constitute forgery according to British laws, and there was no evidence that they constituted the crime of forgery, for which crime alone extradition could be demanded, in any State, except that of New York.

In the case at bar, we show that the crime charged is made criminal by the laws of England, by the Revised Statutes of

the United States, and also by the laws of the State of New York, the place where the accused is found. It is also a crime under the laws of many other States of the Union. Suppose that the position was reversed, that the appellant had been apprehended in England for a violation of subdivision 3, section 611, New York Penal Code, and his extradition asked, would not the Government of the United States be entitled to his surrender under 24 and 25 Victoria, chapter 96, sections 83, 84, and the extradition act of 1870, *supra?*

V.

THE PLAINTIFF HAS NO RIGHT OF ASYLUM IN THIS COUNTRY.

The treaties of extradition to which the United States is a party do not guarantee a fugitive from the justice of one of the countries an asylum in the other. They only make provision that for certain crimes he shall be deprived of that asylum and surrendered to justice, and they prescribe the mode in which this shall be done.

Kerr *vs.* State of Illinois, 119 U. S., 436.

In Grin *vs.* Shine, *supra*, the court said: "We are not "prepared, however, to yield our assent to the suggestion, "that treaties of extradition are invasions of the right of "political habitation within our territory or that every in- "tendment in proceedings to carry out these treaties shall "be in favor of the party accused. Such treaties are rather "exceptions to the general right of political asylum, and an "extension of our immigration laws prohibiting the intro-

"duction of persons convicted of crime (18 Stat. at L., 477, "chap. 141), by providing for their deportation and return to "their own country even before conviction, when surrender "is demanded in the interest of public justice."

VI.

THAT THE APPELLANT IS A CITIZEN OF THE UNITED STATES GIVES HIM NO IMMUNITY TO COMMIT CRIMES IN OTHER COUNTRIES, AND DOES NOT PREVENT HIS SURRENDER UNDER A TREATY OF EXTRADITION, WHICH MAKES NO EXCEPTION IN FAVOR OF SUBJECTS OF THE SURRENDERING COUNTRY.

Neely *vs.* Henkel, 180 U. S., 123.

Moore on Extradition, sec. 138.

Executive Documents of the United States, No. 156, 1884.

VII.

THE APPELLANT IS NOT ENTITLED TO BE DISCHARGED FROM CUSTODY BY REASON OF THE INSUFFICIENCY OF THE COMPLAINT BEFORE THE COURT.

Another complaint has been made, remedying the defects claimed to exist in the first, and this court will not discharge the appellant from all arrest for the crime charged in the complaint. The object of a writ of *habeas corpus* is to ascertain whether the prisoner applying for it can be legally detained in custody, and if sufficient ground for his detention is shown he is not to be discharged for defects in the original arrest or commitment.

Nishimura Ekiu *vs.* U. S., 142 U. S., 651.

Iasigi *vs.* Van De Carr, 166 U. S., 392.

The arrest on the second warrant, under the new complaint, was not illegal.

Re McDonnell, 11 Blatch., 170.

VIII.

THE APPELLANT IS NOT ENTITLED TO BE ENLARGED ON BAIL, UNDER ANY RULE OF LAW OF THE UNITED STATES.

This matter, however, seems to us to concern the Government of the United States, as it has agreed to surrender and deliver to the demanding government the appellant, providing the requirements of the treaty and the laws of this country are complied with.

The Attorney General having advised us that intervention on behalf the United States on this appeal would be made, we might safely leave the argument of the questions involved herein to him, as they will be fully covered. We beg leave, however, to make certain suggestions in respect to this matter of bail.

At the outset we will refer to the case of Queen *vs.* Spilsbury, 1899, 2 Q. B. D., 615, which was cited by the appellant in the court below. This case was not an international extradition case, but came within what is called the fugitive offenders' act, which law is limited to the apprehension of offenders who have committed crimes and been found within the dominions of Great Britain, similar to our interstate rendition laws. The court there did hold that it had the common-law right to admit to bail, but, exercising that right, it being discretionary under the common law whether

to admit to bail or not, it denied the application to discharge the accused on bail.

We have not been able to find any case reported in England where bail in an international extradition case was permitted, and the extradition act of Great Britain does not make any provision for bail.

It cannot, we submit, be contended that the courts of the United States have retained or have any rights at common law to enlarge upon bail. The statutes of the United States cover all cases where bail is allowable, and the claim or exercise of any right at common law has been made unnecessary by virtue of these statutes, and common-law bail is therefore at the present time unknown and the right thereto conferred and limited by statute.

Section 1015 of the United States Revised Statutes provides as follows: "Bail shall be admitted upon all arrests "in criminal cases where the offense is not punishable by "death, and in such cases it may be taken by any of the per- "sons authorized by the preceding section to arrest and im- "prison offenders."

The preceding section of the United States Revised Statutes provides:

"For any crime or offense against the United States, the "offender may, by any justice or judge of the United States, "or by any commissioner of a circuit court, to take bail, or "by any chancellor, judge of a supreme or superior court, "chief or first judge of common pleas, mayor of a city, jus- "tice of the peace or other magistrate of any State where he "may be found, and agreeably to the usual mode of process "against offenders in such State, and at the expense of the "United States be arrested or imprisoned or bailed as the

"case may be for trial before such court of the United "States as by law has cognizance of the offense * * *."

The remainder of section 1014 has no bearing upon the question before the court, but applies to the return of process, recognizance of the witnesses, and the removal of the offender from the place where apprehended to the place of trial.

Sections 1014 and 1015 must be read together on this question, and when in section 1015 it is stated "bail shall be admitted upon all arrests in criminal cases" by the persons authorized by the preceding section to arrest and imprison offenders, it was intended to apply, and was limited in its application, to arrests in criminal cases for any crime or offense against the United States.

Sections 1014 and 1015 were contained before revision in one section of the statutes, section 33, judiciary act, volume 1, United States Statutes at Large, page 91, and in chapter 22 of the acts of the second Congress (1 Stat. at Large, 334).

It is clear that bail is only authorized under the Revised Statutes where the offense is against the laws of the United States, and bail is for his appearance in the courts of the United States or before committing magistrates.

This proceeding is not against an offender of the laws of the United States. While criminal in its nature, it is not a criminal case, under the laws of the United States, but rather a quasi-criminal proceeding under a treaty and special statutes of the United States for the apprehension and surrender of a fugitive from justice, upon the fulfillment of certain conditions required by the terms of the treaty and the law.

There appears to be one case reported where this matter of bail in international extradition cases was determined, and that is in the *Matter of Carrier, 57 Fed. Rep., 578*, where it was held that the matter of admitting to bail was not a question of practice; that it had been regulated by statute, and that bail is not allowed in any case except in pursuance of some statute; that although the United States Revised Statutes in respect to procedure in extradition did not forbid bail in such cases, this was not enough, the authority should be expressed in the law itself, and that as there was not in the act any provision for bail, none could be permitted.

Section 5270 of the Revised Statutes clearly implies that no bail is to be allowed, for upon his commitment for surrender by the commissioner he shall commit him "to the "proper jail, there to remain until such surrender shall be "made."

The right to bail is negatived by implication, in that no affirmative right to bail is given by statute or the statute governing extradition.

The difficulty with permitting bail in these matters has been apparently understood by the law-makers.

The treaty provides that any person found within the jurisdiction of either of the high contracting parties charged with a crime, within the treaty, committed within the jurisdiction of the one making the demand, who shall be apprehended in the territory of the other, upon the complaint under oath stating the jurisdictional facts, and that a hearing shall be had, and if the evidence is deemed sufficient, it is to be certified as required and a warrant is to be issued for the surrender of the accused.

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What each government contracts to do is to surrender any person for whom a warrant of surrender is issued.

Take this case as an illustration of what the permission of bail might mean. The accused is admitted to bail. The proceedings result in a warrant of surrender. At this time the accused has fled. The United States Government is unable to fulfill its obligation under the treaty to surrender the accused, and that is just what in the matter of bail in extradition cases would be the difficulty, that the Government might be placed in a position that would make it unable to comply with the treaty provisions. As a matter of query: To whom should the undertaking for bail run? There is no provision of law for it. If bail is forfeited, who is to enforce the bond? Who is to attempt to regain custody of the accused? When the demanding government has done all the treaty and law requires of it in the proceedings, it is entitled to the delivery of the accused upon the issuing of a warrant of surrender.

The laws of the United States never contemplated any provision whereby there should be a possibility of a miscarriage of the provisions of the treaty, and have carefully refrained from permitting a nullification of the treaty in a particular case by a release on bail and escape.

Bail in interstate rendition cases is taken by virtue of the statutes. Where no statute existed it has been held that bail could not be taken.

IX.

IT WAS NOT NECESSARY THAT A WARRANT SHOULD HAVE ISSUED OR AN INDICTMENT HAD BEFORE THE COMMENCEMENT OF THESE PROCEEDINGS.

Grin *v.* Shine, *supra.*

Re Farez, *supra.*

X.

THE ORDER OF THE CIRCUIT COURT SHOULD BE AFFIRMED.

CHARLES FOX,

Of Counsel for Appellee, H. B. M. C. General.

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FILED
APR 28 1903
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the southern district of New York, et al. } No. 661.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

FILED BY LEAVE OF COURT.

3749

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BRIEF ON BEHALF OF THE UNITED STATES.

FILED BY LEAVE OF COURT.

This is an appeal from the decision of the United States circuit court for the southern district of New York dismissing writs of habeas corpus and certiorari sued out by the petitioner herein and remanding the said Whitaker Wright to the custody of the United States marshal for said district under a warrant issued by United States Commissioner Thomas Alexander pending proceedings for his extradition to Great Britain.

This case was instituted on the complaint of Sir Percy Sanderson, the consul-general of Great Britain

at New York, and in a sense the United States is not concerned. The United States, however, asks to be heard because certain questions presented are public and international, involving ultimately its obligation under this particular treaty with Great Britain, and requiring consideration of the principles affecting treaties and extradition generally.

But the United States does not appear to be called upon in the present proceeding and does not volunteer to present any argument on the special facts of this case relative to the exact nature of the offense charged. Such argument will properly be left to counsel for the British Government.

While the complaint in this case, issued by the commissioner on the 16th day of March, 1903, asks for a provisional warrant for the arrest of said Wright it is to be observed that the treaty between the United States and Great Britain of August 9, 1842, and the extradition convention between the United States and Great Britain of July 12, 1889, contain no clause for provisional arrest and detention, such as is found in several other treaties for the extradition of criminals.

> Convention between the United States and the Kingdom of the Netherlands, June 2, 1887, Art. XII. (26 Stat. at L., 1487.)
>
> Convention between the United States and the Republic of Colombia, May 7, 1888, Art. VII. (26 Stat. at L., 1537.)
>
> Convention between the United States and the Empire of Russia, March 28, 1887, Art. VII. (28 Stat. at L., 875.)

Neither do the statutes of the United States relative to extradition contain any general provisions imposing upon this Government the duty of apprehending and detaining fugitive criminals to await the arrival of extradition papers from the foreign government.

We feel, however, that there are at least two questions of law presented by the record in this case which are of general importance, the decision of which may be controlling in all future extradition cases.

I.

THE APPEAL HEREIN SHOULD BE DISMISSED FOR THE REASON THAT ALL PROCEEDINGS UNDER THE COMPLAINT OF MARCH 16, 1903, AND THE WARRANT OF ARREST ISSUED THEREON HAVE BEEN ABANDONED BY THE BRITISH GOVERNMENT.

The affidavit of Mr. Charles Fox, counsel for the British Government in this case, shows that there is in realty no case before the court, or at least nothing but a moot inquiry. The British Government has abandoned absolutely the complaint of March 16, which is the foundation of this appeal. It has moved that this complaint and suit be dismissed, and has consented that, so far as said complaint is concerned, the appellant may be released forthwith. The commissioner before whom such motion was made held that he was without power to dismiss because the case had gone from him to the circuit court on habeas corpus and certiorari, and now it has proceeded beyond that court. But surely in the forum which has jurisdiction, a suitor may dismiss his proceeding, especially a suitor who is the representative of a friendly

foreign government seeking to exercise under a treaty an international right which expresses a comity of the highest consequence and necessity. We understand that the British authorities say again, and now to this court, that they seek to dismiss their complaint of March 16. They have filed before the commissioner, and are proceeding under, a new complaint setting forth with greater detail and formality the charge against Wright. The motion was renewed more than once to dismiss the complaint of March 16. The new complaint of March 31, and the proceedings under the latter complaint, are now before this court in the form of an affidavit. We understand it to be a general principle that a complainant may thus dismiss and begin *de novo*. The suggestion, therefore, is pertinent that this court may properly dismiss the pending appeal on the ground that there is nothing before it herein, without prejudice, however, to any contention which the appellant may present here or elsewhere on the merits, when an actual and proper case is presented, and such actually existing case is already presented before the commissioner.

But assuming that this court may now desire to hear argument with reference to the questions of law which the Government conceives to be of such importance as to require it to ask leave of the court to be heard, we will proceed at once to their discussion.

II.

IF THE LAWS OF THE STATE OF NEW YORK, WHEREIN THE PETITIONER WAS ARRESTED, MAKE THE ACT CHARGED IN THE COMPLAINT CRIMINAL, WHICH ACT IS MADE CRIMINAL BY THE LAWS OF GREAT BRITAIN, THE PETITIONER COULD BE PROPERLY HELD FOR EXTRADITION UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, NOTWITHSTANDING THE FACT THAT SUCH ACTS AS CHARGED IN THE COMPLAINT ARE NOT MADE CRIMINAL BY THE STATUTES OF THE UNITED STATES.

> It has been held that the rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offense had there been committed, applies not only to the admissibility and the amount of evidence required for that purpose in the particular place, *but also to the definition of the offense.* (Moore on Extradition, sec. 344.)

In the case of Christiana Cochrane (4 Opins., 330), Attorney-General Nelson, said:

> No rule more explicit or certain than that contained in the treaty itself can, indeed, be prescribed. Cases as they occur *necessarily depend upon the laws of the several States* in which the fugitive may be arrested or found.

And Mr. Calhoun, while Secretary of State, on December 4, 1844, in a note to the French minister, said:

> What evidence is necessary to authorize an arrest and commitment *depends upon the laws of the State* or place where the criminal may be found. (Moore on Extradition, sec. 344.) See also note containing correspondence between

> the Dutch minister and Mr. Fish, then Secretary of State, relative to this same question, in 1873. (Moore on Extradition, sec. 337.)

And this construction of extradition treaties by the State Department seems to find ample support in the decisions of the Federal courts. An early case in which we find this question considered is *In re Muller* (17 Fed. Cases, 975), which arose in the district court for the eastern district of Pennsylvania in 1863. The court in that case said:

> The remaining question was whether these depositions would, within the meaning of the treaty, have sufficed to justify his apprehension and commitment for trial under a charge of forgery if the offense had been committed here. They fully sufficed to prove the act which was charged. Such an act, wherever punishable as a crime, is properly classed as a specific offense under the general head of "forgery." In the jurisprudence of Pennsylvania, at the date of the treaty with Saxony, this act would not have been punishable as a crime. But before its commission in Saxony, the Pennsylvania statute of March 31, 1860, sec. 169 (Laws, 1860, p. 423), had made such an act indictable and punishable as a misdemeanor. In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and leg-

islation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place but not in another. I thought that the question *depended upon the law of Pennsylvania under the statute of 1860*, and that the case on the part of the Saxon Government had, therefore, been made.

There is no jurisprudence or common law of the Government of the United States. See [*U. S.* v. *Hudson*] 7 Cranch [11 U. S.], 32; [*U. S.* v. *Coolidge*] 1 Wheat. [14 U. S.], 415; [*Wheaton* v. *Peters*] 8 Pet. [33 U. S.], 658; [*Kendall* v. *Stoker*] 3 How. [44 U. S.], 104. No legislation of their Government, independently of the jurisprudence and legislation of the *several States*, can have been expected by those who made the treaties ever to give specific definition of certain crimes mentioned in them. No such legislation as to forgery or private writings, which is the offense here charged, can have been expected. As to crime, and others, *local definitions and rules might be not less different in Ohio and Pennsylvania and in Scotland and in England, or might be more different.* In framing the treaty of 1842 with Great Britain, *these local differences must have been mutually considered* by the governments of the two contracting nations. (17 Fed. Cases No. 9913, p. 975.)

And in the case of *In re Farez* (7 Blatch., 345; 8 Fed. Cas., 1007), which arose in the circuit court for

the southern district of New York in 1870, the court said:

> The warrant of arrest issued against the prisoner in Switzerland, and translations of the foreign documents and the statutes of the State of New York, were then put in evidence without objection. It was then admitted by the counsel for the prisoner that the prisoner was Francois Farez, and that he was a farrier and hotel keeper, of Les Bois, Switzerland. The prosecution then rested, and the counsel for the prisoner moved to discharge the prisoner on several grounds. The first was that it ought to be shown that the punishment for the offense charged was infamous, and that that had not been shown. I think that the proper construction of the fourteenth article of the convention with the Swiss Confederation is that there can be no extradition of a person charged with any one of the crimes enumerated in that article unless such crime is subject to infamous punishment in the country where the crime is committed. It was therefore necessary to show in this case that the crime with which Farez was charged was subject to infamous punishment in Switzerland. That was, in my judgment, sufficiently shown. The offense charged was clearly, according to the papers, *an offense against the laws of the Canton of Berne, just as here it would have been an offense against the laws of the State of New York.*

And in the case of *Grin* v. *Shine*, 187 U. S., 181, a similar question was referred to. And while the court did not deem it necessary to inquire whether the words

"evidence of criminality" included a definition of the crime charged, or to determine by what law the elements of the crime of embezzlement are fixed, the court nevertheless applied the definition of embezzlement given in the laws of California, for the reason that the petitioner himself sought to apply such definition as being most favorable to himself.

Such a construction of an extradition treaty for obvious reasons must be adopted, for every extradition treaty which the United States has entered into with a foreign government contains an enumeration of some crimes that are not made offenses under the laws of the United States as distinguished from the laws of the several States, and in some instances an enumeration of crimes which were not offenses at common law.

The language of the treaty between the United States and Great Britain, which it is claimed by counsel for the appellant to be against this construction, is contained in paragraph 4 of Article I of the Extradition Convention of July 12, 1889 (26 Stats., 1508), and is as follows:

> Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

Judge Lacombe, in his opinion found on page 11 of the record in this case, in construing this provision of the treaty, says:

> When, by the law of England and by the law of the State in which the fugitive is found,

> the fraudulent acts which it is charged he has committed are made criminal, he is fairly within the treaty; a statute of the State is, broadly speaking, a "law of this country" as contradistinguished from a "law of Great Britain."

The language of the treaty is as broad and comprehensive as it is possible to make it—"being made criminal by the laws of both countries." It does not say "made criminal by the acts of the British Parliament and the *Federal laws* of the United States," for such a provision would manifestly be inadequate for the purposes of the treaty. For on the side of Great Britain is contemplated the criminal laws of England, Scotland, Ireland, Canada, Australia, and all other British colonies or dependencies, while on the part of the United States the treaty must necessarily contemplate the Federal criminal laws, as well as the criminal laws of the several States. At the time of the making of this treaty this Government recognized to the fullest extent that the laws made by the legislatures of the several States were the laws of this country. Furthermore, as to this point it seems to preclude further discussion if we ask the simple question: Suppose the case were reversed and the United States were seeking to extradite under this treaty from Great Britain a person indicted for this same offense or for murder under the laws of the State of New York, would the tribunals of Great Britain be justified in declining to find the offense charged to be within the treaty because the law violated here was a law

of one of the several States and not a law of the United States?

Section 611, paragraph 3, of the penal code of the State of New York, provides as follows:

> A director, officer, agent, or employee of any corporation or joint-stock association who: * * *
>
> Knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, * * * is guilty of a misdemeanor. (Identical with § 603 N. Y. Penal Code, 1882.)

While section 84, chapter 96, of 24 and 25 Victoria, provides:

> Whosoever, being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written Statement or Account which he shall know to be false in any material Particular, with Intent to deceive or defraud any Member, Shareholder, or Creditor of such Body Corporate or Public Company, or with intent to induce any Person to become a Shareholder or Partner therein, or to intrust or advance any Property to such Body Corporate or Public Company, or to enter into any Security for the Benefit thereof, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to any of the Punishments which the Court may award as hereinbefore last mentioned.

It will thus be seen that the laws cited exactly apply to the facts set out in the new complaint of March 31, 1903, and thus clearly present a case which is "made criminal by the laws of both countries," in accordance with the phrase of the treaty under consideration.

In re Frank (107 Fed. Rep., 272) is a case in which the United States court for the district of Oregon considered the treaty between the United States and Great Britain and held that, for the purpose of determining whether the offense was an extraditable one under that treaty, the laws of the State of Oregon, where the petitioner was arrested, and the laws of the province of British Columbia, where the offense was alleged to have been committed, should be resorted to for the purpose of determining such question.

The decision there was that, since upon particular inquiry the British law made that a crime which was not a crime in Oregon, the accused must be discharged; but that result does not affect the point which we are making.

In *Cohn* v. *Jones, warden* (100 Fed. Rep., 639), the United States district court for the southern district of Iowa clearly recognized that in construing the extradition treaty between the United States and Great Britain the laws of Iowa should be resorted to. It may be observed that the court there also held that the question whether a given offense comes within a treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for; but as we have pointed out, the New York law of 1882

covered the offense in this case, and the English law is of the year 1862. We therefore rely on the finding of the circuit court that the offense here comes within the laws of both countries.

III.

THE PETITIONER WAS NOT ENTITLED TO BE ENLARGED ON BAIL UNDER ANY LAW OF THE UNITED STATES, FOR THE REASON THAT NO PROVISION IS MADE IN THE LAW RELATING TO EXTRADITION OF CRIMINALS FOR ADMISSION TO BAIL.

The statutes of the United States, relating to procedure in extradition cases, contain a significant indication of the way in which the law views this matter. Section 5270 of the Revised Statutes provides for complaint, arrest, hearing, etc., and directs the commissioner or judge "to issue his warrant for the commitment of the person so charged to the proper jail, *there to remain* until such surrender shall be made."

We are informed that counsel for appellant, in the court below, urged as an authority for the commissioner to enlarge the petitioner on bail the case of *Queen* v. *Spilsbury* (1898, 2 Q. B. D., 615). But an examination of this case shows that it was not an international extradition matter, but came within what is called the "fugitive offenders act;" which law is limited in its application to the apprehension of offenders who had committed crimes and been found within the dominions of Great Britain, and is very similar in its provisions to our interstate rendition laws. The court there held that it had the common-law right to admit

to bail; but, exercising that right, it being discretionary under the common law whether to admit to bail or not, it denied the application to enlarge the accused upon bail.

And while the court in that case came to the conclusion, after considerable hesitation, that it had the power to admit to bail under the fugitive offenders act, Justice Wright, in a concurring opinion, clearly recognized that the case should not be considered a precedent under extradition treaties. His language is as follows:

> I am of the same opinion, and for the same reasons, but I wish to add this observation, that cases arising under the fugitive offenders act will not in all instances apply as precedents in cases under the extradition acts. Under the fugitive offenders act it is generally a question between different parts of Her Majesty's dominions, but under the extradition acts the jurisdiction depends in all cases on treaties with foreign countries. (2 Q. B. D., 1898, pp. 615–625.)

The treaty provides that any person found within the jurisdiction of either of the high contracting parties, charged with a crime mentioned in the treaty and committed within the jurisdiction of the one making the demand, shall be apprehended in the territory of the other upon a complaint under oath stating the jurisdictional facts, and that thereupon a hearing shall be had; and if the evidence is deemed sufficient it is to be certified, as required by law, to the Secretary of State, in order that a warrant may be issued for

the surrender of the accused. Each Government contracts in such case to surrender any person for whom a warrant for surrender is issued. But if the accused were permitted to be released on bail, and the proceedings should result in a warrant of surrender, and it should then appear that the accused had fled from the jurisdiction of the government, it would be impossible for such government to fulfill its obligation under the treaty by surrendering the accused. If the bail should be forfeited, who would enforce it, and whose duty would it be to attempt to regain the custody of the accused? When the demanding government has done all the treaty and the law requires it to do, it is entitled under the stipulations contained in the treaty to the delivery of the accused upon the issuance of a warrant for his surrender.

A fortiori we claim that the accused should not be released from custody pending an examination and the proceedings leading up to such commitment for final surrender.

There appears to be but one case reported wherein this matter was squarely considered, viz: *In re Carrier* (57 Fed. Rep., 578), in the district court for the district of Colorado, in which Judge Hallett said:

> Petitioner is charged with larceny in the Dominion of Canada before a commissioner of the circuit court, under the treaty of 1842 with Great Britain, and title 66 of the Revised Statutes, relating to extradition. The commissioner has continued the hearing for some days with a view to obtain further testimony, and he has

refused to admit the petitioner to bail during the time of such continuance. The matter for consideration upon the petition is whether the accused is entitled to be enlarged on bail under the circumstances. Obviously a proceeding in extradition under the treaty and the act of Congress of 1848 (9 Stat., 302), with a view to determine the probable guilt of the accused before executing the terms of the treaty, is quite aside from the general course of criminal procedure. It is not a question whether larceny is a crime bailable at common law, or by our law, or by the law of Canada. The proceeding stands upon the statute only, and it is believed that no departure can be made from the statute in any substantial matter. It is said that in matters not mentioned in the statute the practice should be according to the course of our law. The matter of admitting to bail is not a question of practice. Since the time of Edward I it has been regulated by statute; and in our day bail is not allowed in any case except in pursuance of some statute.

It was said by counsel for petitioner that there is nothing in the act of 1848 to forbid the allowance of bail pending a hearing. But this is not enough; the authority should be expressed in the act itself. It provides that, if the charge be sustained, at the hearing, "It shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made;" so that, in so far as there is in the act any expression on

the subject, bail is denied. It is significant that in the earlier act of 1789 (1 Stat., 91), relating to the arrest of persons in one Federal district who may be charged with crime in another district, there is ample provision for taking bail, and therefore it can not be said the subject was overlooked in the act of 1848. In 1882 the act of 1848 was considerably amended in respect to the manner of getting testimony and some other matters, but the subject of bail was not touched upon (22 Stat., 215). This last act further shows the intention of Congress to regulate all proceedings in extradition by special act, leaving nothing of substance to be borrowed from the general course of criminal procedure. Inasmuch as there is not in the act of 1848 or in any of the amendatory acts any provision for bail pending a hearing, under those acts the decision of the commissioner seems to have been correct, and the writ will be refused.

And Judge Lacombe, in the case at bar, said:

Applications to admit to bail in such cases have on several occasions (although not recently) been made to the circuit court in this district, and have been uniformly denied, although no opinions appear to have been written.

It is not difficult to conceive of some sufficient reason why the United States, having assumed certain treaty obligations, should provide a scheme for carrying them out which should not provide for enlargement on bail; and we find that, whereas the statutes regulating the arrest of persons in one Federal district who may be

charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision.

The opinion of Lord Russell in *Queen* v. *Spilsbury*, 2 Q. B. D. (1898), 615, upon which petitioner principally relies, and which holds that "the Court of Queen's Bench has, independently of statute, by the common law, jurisdiction to admit to bail," is not persuasive. The opinion concludes with the statement: "This inherent power to admit to bail is historical, and has long been exercised by this court, and if the legislature had meant to curtail or circumscribe this well-known power their intention would have been carried out by express enactment." The circuit courts of the United States, however, have no such historical heritage. "These courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them." (*Bath County* v. *Amy*, 13 Wall., 244.)

While the authorities are singularly few in which this question of the right of the accused to give bail has been presented to the courts, the practice of refusing bail has been universally recognized both in this country and in England, and we do not remember a single case in which the courts of either country have released the accused on bail during the pendency of such proceedings.

The Constitution of the United States contains the provision that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted." (United States Constitution, Art. 8.) And similar provisions are contained in the constitutions of the several States. Section 5 of Article I of the constitution of the State of New York is as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

But these provisions of the State and Federal constitutions have evidently never been construed as conferring upon the accused a constitutional right to enlargement on bail in all cases.

Sections 1014 and 1015 of the Revised Statutes of the United States are as follows:

> SECTION 1014. For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses

> for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had. (See sec. 879.)
>
> SECTION 1015. Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death, and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.

These two sections must be read together, and it is apparent that the law relative to bail contemplates "crimes and offenses against the United States."

It is evident, therefore, that the legislative branch of our Government had a purpose in omitting, from all extradition treaties and from the laws governing the course of procedure in such cases, any provision which would allow the accused to be released on bail. And we can not express that purpose of the law-making power more forcibly than to conclude this discussion with a quotation from Judge Lacombe's decision in the case at bar:

> It is not difficult to conceive of some sufficient reason why the United States having assumed certain treaty obligations should provide a scheme for carrying them out which should not provide for enlargement on bail;

> and we find that whereas the statutes regulating the arrest of persons in one Federal district who may be charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision. (Record, p. 11.)

It is, therefore, respectfully submitted that the decision of the United States circuit court for the southern district of New York on the questions of law herein discussed should be sustained.

HENRY M. HOYT,
Solicitor-General.

MILTON D. PURDY,
Assistant Attorney-General.

○

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.*

Supplementary Brief of H. B. M. Consul-General at New York, Appellee.

Filed by Permission of the Court.

I.

THE COMPLAINT OF MARCH 31 IS NOT IDENTICAL WITH THAT OF MARCH 16.

The complaint of March 31, 1903, charges the appellant, in addition to what is contained in the complaint of March 16, "that he did also, at the times mentioned in the complaint, then being a director and manager of said company, with intent to defraud, alter

and falsify books, papers and writings belonging to the said Company, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said Company, and did also at the same time, then being a director of said company, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books or accounts and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company, and other persons."

These charges are within and made under the provisions of Section 83, of Chapter 96, of 24 and 25 Victoria, a copy of which is contained on page 12 of the original brief. The offenses thus additionally charged, while not conceding they are not within subdivision 3 of Section 611 of the New York Penal Code,—are clearly within Section 514 of the New York Penal Code, which reads as follows:

> "Section 514.—Other causes of forgery in the third degree. A person who either (1) being an officer or in the employment of a corporation, association, partnership or individuals, falsifies or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of account, records or other writings belonging to or appertaining to the business of the corporation, association or partnership or individuals, * * * is guilty of forgery in the third degree."

It seems to us that it was the manifest purpose in the use of the words "made criminal by the laws of both countries," to simply leave open for determination the question, Are the acts charged a crime in ~~either~~ Both countries? If they are a crime in both countries, no matter by what name called, then they are intended to be within the treaty. That in England it is called "fraud by a director," and in New York "forgery," is

not of the slightest consequence so far as the application of the treaty is concerned. The only question before the Court is, Are the acts charged against the appellant a crime in England, and also a crime in New York? That such acts constitute a crime in England, is conceded by the argument and brief on behalf of the appellant; and the only open question, apparently, is, Are these acts a crime in New York?

This would seem, from the citations from the Penal Code, to be removed beyond a doubt, and the additional charges contained in the complaint of March 31, would constitute the crime of forgery in the third degree, if they had been committed in New York.

The appellant, on page 3 of his brief, in reply to the Solicitor-General, makes the suggestion that the Court should here determine and hold that the appellant is not extraditable for the offense contained in the complaint of March 16, although he may be under the additional charges contained in the complaint of March 31. We submit that this would be going beyond the point to which this Court has limited its power of review in these cases, as cited in the original brief; that, there having been no examination in this case,—*i. e.*, the testimony upon the examination not being before the Court,—the Court limits its review to the question of the jurisdiction of the commissioner, and if any of the offenses charged in the second complaint are extraditable, then the commissioner had power to issue the warrant, and this Court will leave the further determination of the extraditability, on the facts, to the Commissioner.

II.

THE OFFENSES CHARGED AGAINST THE APPELLANT IN THE COMPLAINT OF MARCH 16 ARE WITHIN SUBDIVISION 3 OF SECTION 611 OF THE NEW YORK PENAL CODE, AND WITHIN THE TREATY; SECTION 611 IS CONTAINED IN CHAPTER XI, TITLE XV, WHICH IS ENTITLED, "FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS IN THEIR MANAGEMENT."

The word "knowingly," as used in this section, is defined by the Penal Code. Section 718, entitled "Construction of Terms" provides as follows:

> "In construing this Code, or an indictment or other pleading in a case provided for by this Code, the following rules must be observed, except where a contrary intent is plainly declared in the provision to be construed, or plainly apparent from the context thereof * * * (4) the term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission."

We submit that the New York statute, so far as the making of a false report is concerned, is equivalent to what is contained in the English statute. We cannot see much distinction between knowingly concurring in making a written report, exhibit or statement * * * containing any material statement which is false, and making or concurring in making a written statement or account "which he shall know to be false in any material particular."

Without trying to follow the counsel for the appellant in the fine distinctions he attempts to draw between the

New York statute and the English statute,—surely a person charged in New York with the offense as charged in the complaint in this proceeding would be subject to the provisions of Section 611 of the New York Code.

III.

A STATE IS CONSIDERED A COUNTRY, WITH REFERENCE TO CERTAIN CONDITIONS.

In Dicey on Domicile, page 31, the author says:

> "The word 'country' has, among its numerous significations, the two following meanings, which require to be carefully distinguished from one another. (1) A country, in what may be called the political sense of the word, means the whole of the district or territory subject to one sovereign power, such as France, Italy, the United States, or the British Empire. (2) A country, in what may be called the legal sense of the word, means a district or territory which, whether it constitutes the whole or a part only of the territory subject to one sovereign, is the whole of the territory subject to one system of law,—such, for example, as England, Scotland, or Ireland, or as each of the States which collectively make up the United States."

IV.

BAIL.

It was a rule at common law, that an escape while at large on bail, upon re-arrest, was sufficient reason for refusal to re-enlarge on bail.

The appellant's situation is not unlike that of a person who has forfeited his bail. He has fled from the jurisdiction of the country whose laws he has violated, and did not touch the soil of this country, except in custody, under extradition proceedings.

There are difficulties in these international extradition cases in the matter of bail, that cannot arise in others. If bail is taken and the bond forfeited to whom is the penalty to belong. A demanding government would not be asked to accept in lieu of the person to be surrendered, the amount of money represented in the bond.

If the accused is charged with a felony, he must be personally present at the examination, and an enlargement on bail and escape would end the extradition proceedings until re-capture. In this particular case there have been no unreasonable delays in the prosecution of the proceeding, as the case has been ready to be submitted to the Commissioner since April 15, so far as the prosecution is concerned.

V.

THE DECISION IN THE WINDSOR CASE HAS CEASED TO BE CONSIDERED IN THIS COUNTRY, AS A REASON FOR REFUSING EXTRADITION.

This case was decided almost forty years ago, since that time, there has been in both countries, a much more liberal view of the purpose of treaties of extradition, but particularly in the United States, and in a case, recently decided, the Judge in the Court below, in answer to a contention that reciprocity was or ought to be the rule in these proceedings, gave expression substantially to these views.

At one time it seemed to be the theory that the sole foundation of the practice depended upon reciprocity,

and that if some particular country were backward about returning our criminals, we would be keen to keep theirs. At last, however, it seems to have been discovered that the foreign criminal was not a particularly valuable acquisition, and that although it might be highly desirable, that offenders against our laws should be brought back here and tried, as a deterrent example, it was probably more important that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied they were criminals.

CHARLES FOX,
Of Counsel for H. B. M.
Consul-General, Appellee.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

"MADE CRIMINAL BY THE LAWS OF BOTH COUNTRIES."

That principle is inherent in all extradition treaties, whether expressed or not. This is obvious because of the reciprocal nature of such engagements and the existence and similarity of crime in all places, whatever the differences as to definition and incidents of any particular crime. All countries and races, under every language and legal system, know the crimes of murder, burglary, arson, etc., under some designation; and when there is a convention to surrender

it is evident that the interest and contract are mutual, and that each jurisprudence takes cognizance of such offenses. Phillimore says (International Law, Vol. I, p. 413, ed. of 1854) that in all cases of extradition the act done on account of which extradition is demanded must be considered as a crime by both States. This passage was quoted by counsel and the principle recognized by the court in the Windsor case. Treaties plainly imply the doctrine, but do not ordinarily express it. Such is the force of the phrase "mutual requisitions," and the meaning of the requirement of evidence of criminality according to the law of the place of arrest, as justifying trial, "if the crime or offense had there been committed." (Art. X of the Webster-Ashburton treaty)

When different systems are to be adjusted the treaty often contains a definition. Thus our treaties with civil-law countries specify the inclusions in the crime of murder under their codes, or define burglary by our own law, and also by the translation of the foreign description of that crime. (Treaties with France of 1843 and 1845, with Italy of 1868, with Belgium of 1882.)

Such cautions are necessary; international agreements are weighty matters; their precise meaning must be clear. Nations are slow to enter into extradition engagements, and naturally limit the direction and extent of the obligation. They treat respecting serious crimes; they exclude political offenses. In view of the universal right of defense, it must fairly

appear that an offense comprehended in the contract has in fact been committed. On the other hand, technical differences, the importance of names may be exaggerated; and it is on diligent and scrupulous inquiry as to the differences that treaties have failed of effect.

Therefore, as confidence between nations has grown, the liberal view of extradition treaties as effectuating common and proper purposes emphasizes the broad, essential correspondences, and minor technical distinc tions and the mere designation or description of crimes have less weight.

For example, in *Grin* v. *Shine* it is evident that if the act charged was an offense by the law of Russia and also by the law of California, it made little difference that under refined analysis the act might be a form of embezzlement in one place and a form of larceny in the other. It was, after all, criminal by the laws of both countries. It is to be noted in passing that the treaty with Russia does not contain that phrase in its enumeration of offenses. The same idea appears in *United States* v. *Bryant* (167 U. S., 104). There the essential criminal character of the transactions was regarded, although in one country or the other, under different counts and aspects, the thing done might be larceny or embezzlement or forgery.

I submit that the following ideas should guide and govern all extradition inquiries—that the charge has been deliberately and authoritatively made by a responsible and friendly civilized power; a strong presumption of verity and good faith attaches; the matter

is of the highest comity and reciprocal concern; the accused person is the demanding Government's offender, and under their charge it is to be presumed that he is seeking covert refuge in the country of arrest and is a fugitive from justice. The nature of the subject fairly requires a modification, so far, of the presumption of innocence; that presumption revives in full force in the trial jurisdiction. I do not suppose we would treat in extradition with a country wherein the theory of innocence until guilt is established did not have a certain recognition, or at least wherein there was any assumption of guilt until innocence is proved.

When we ask for delivery of a person charged with the commission of a crime here, it is because our authorities are convinced that in substance and essence a serious offense appears and we are entitled to try our own evildoer. We are bound to presume the same conviction and good faith upon the part of our neighbors. Let the defenses appear and due resistance be made and all rights be invoked in the trial jurisdiction; the only real inquiries upon demand for surrender are whether a complaint under the treaty is authoritative, deliberate, and bona fide; whether there is sufficient to commit for trial; whether there is probable cause fairly construed; whether, in other words, the demand is earnest and substantial, or merely experimental and without real merit.

Under common legal inheritances the United States and England, by mere enumeration, denote with espe-

cial accuracy and a complete mutual understanding the scope of the various major offenses. As statutory enactments in each country enlarge or qualify the contents of common-law crimes, the new meaning is recognized, if not adopted, in the other country.

Violent and inconsistent changes are not to be presumed, and the general tendency is the same in both countries. The suggestion is volunteered that in proceedings to extradite for arson, for example, England would recognize our claim, although the strict conditions of the common-law definition had been enlarged, in order to extend the remedy, in the particular State of the Union where the crime was committed. A higher idea of comity pervades the entire field, and the drift is, I think, to recognize and include under existing treaties statutory redefinitions of old offenses.

It is true that when there is proper reason to doubt whether the generic term should embrace a particular variety, the treaty is specifically supplemented. Thus "manslaughter when voluntary" went into the convention of 1889 with Great Britain. It may well be that claims as for murder had been made, which, involving life, emphasized the right of defence and the duty of close scrutiny in the jurisdiction of arrest; and so, those escaping delivery who had at least committed voluntary manslaughter, that offence was properly and explicitly added to the treaty.

Now, offenses falling generally under the head of fraud and breach of trust have only in recent times come within the reach of criminal law. They are in-

numerable in variety and are hard to define and grasp. It is not very long since they were visited only with civil liabilities and penalties in the way of damages. It is often still difficult to establish their criminal character, and laws affecting them differ widely.

Embezzlement was the first of the type to emerge in definite penal form, and the evolution has associated fraud and breaches of trust, in their changing aspects, with larceny, embezzlement, and forgery. But it is clearer all the time in modern life that the fraud group of offenses is very serious and destructive, and requires prompt and thorough repression.

Looking, then, at the treaty of 1889 in the light of the foregoing discussion, no phrase was needed to explain the crimes of murder, burglary, etc., nor to express the necessity of criminality in both countries. They *are* criminal in both countries without that. Piracy must be "by the law of nations," because, in view of marked local differences, it was not desired to contract for a larger or different meaning. So as to the slave trade, "against the laws of both countries;" this was a criminal matter, of course, but there were, or had been, some peculiar local aspects, and the agreement was carefully restricted to the elements held in common. Some suggestion of reasons, not existing, of course, in 1889, will be found in the argument and Lord Cockburn's comments thereon in the Windsor case, referring to the situation here prior to the civil war. Similar and more modern reasons for the express restriction can be divined. The misgiving seems to have been

whether some strange and inconsistent offense might not be included under the particular designation by the laws of one country. (*Vide* argument in Windsor case as to piracy and slave trade.)

The point is the same, under treaties with England (cl. 10 of Art. I of treaty of 1889) and various other nations (e. g., clause 12, Art. II, treaty with Belgium of 1882; first paragraph, Art. II, treaty with Russia of 1887) respecting attempts to commit crime and participation. The contracting parties did not desire to engage, as to those secondary and accessorial matters, unless both countries definitely recognized criminality.

What, then, is the difference as to clause 4 of the treaty of 1889 with England (~~clause 10, Art. I, treaty of 1889~~) respecting fraud by bailee, etc.? Simply this: As to that class of offenses, not yet completely established as criminal, the two powers decline to engage respecting species still carrying a mere civil liability, and therefore the phrase "made *criminal* by the laws of both countries" was used. Nevertheless, although so far restrictive, the implications remaining are enlarging, and were so intended. Provided the particular variety is *criminal* in both jurisdictions, exact correspondence is not necessary. The essence and substance are to be regarded, and highly technical considerations fall away. Otherwise there is no stopping place short of the contention that the object and phraseology of the respective statutes must be substantially the same. And that contention is inconsistent with the importance of checking a line of analo-

gous offenses of elusive and protean character, and with the modern liberal view of extradition obligations.

As to the Windsor case—it is and always was true that the determination of our own courts as to what are the laws of *our* country is of paramount authority, and our decisions are unanimous on the point involved. The Windsor opinion was rendered by eminent judges, it is true; but at that period the more liberal and cordial view of extradition had not much affected either governments or courts. It is to be remembered that the offense was not, apparently, a crime in England at all; that the decision was rather that the New York law was novel and exceptional in denominating false entry as forgery, than that the law was not a law of this country; that in suggesting it was not part of the "general law," it is possible that the learned court failed to keep in mind the fact that for most crimes and misdemeanors, substantially for all offenses against private rights, we must look to the laws of the States and not to Federal laws; and that, having a law of the place where the offense was committed before them, it was perhaps a proper assumption for the court to make that the "general law" here, the law of other component sovereignties of this nation, corresponded in substance with the New York law, whatever the law of England was. The rather extreme view which Lord Cockburn was inclined to take is indicated by his question to counsel for this Government, suggesting that if the law of New York made pocket picking murder, that would not make it so by general law.

In seeking to apply the foregoing ideas to the law

of New York presented on this appeal I submit at the threshold that the commissioner's jurisdiction on the merits ought not to be withdrawn by the accused's writ of habeas corpus and appeal to this court at the present stage. I submit, further, that other parts of the code of New York may be pertinent and ought to be examined and considered here or by the commissioner. Doubtless counsel for the demanding Government will offer to the court's notice and deliberation all relevant portions of the New York penal code. I proceed, then, to analyze section 611, paragraph 3, of that code, which is identical with section 603 of the corresponding code of 1882. The treaty specifies fraud as the basis of surrender; the British statute denounces the making, etc., with fraudulent intent, of false statements or accounts of a public company which are known to be false; the New York law provides that if an officer or director of a corporation knowingly makes or concurs in making a false statement of its affairs or pecuniary condition, he is guilty of a misdemeanor. When the object of the New York statute, its language, and the evil to be remedied are carefully considered, there can be no reasonable doubt that it is an exact analogue of the English law. Literal identity is not to be expected. Knowledge and falsity fully appear, and considering the subject-matter, fraudulent intent is a necessary inference from those two facts. The publication of a company statement known to be false is likely to deceive people to their hurt, and that situation is tantamount to fraud and fraudulent intent.

Both fraud and the *scienter* are there on the face of the statute. If the New York law can punish even where there is innocent mistake, then it goes further than the British statute and fully embraces the latter's terms. And where fraud appears in fact and such fraud could be punished under the New York law, the ingenious argument of counsel crumbles and there is room for common sense as well as dialectics. Both statutes denominate the offense a misdemeanor; that the punishment is greater in England can make no difference.

I add finally on the point that the "laws of both countries" include the laws of all the component parts of each, that when the intention is otherwise there is an express reservation. In the treaty of 1887 with the Netherlands the engagement is to deliver for the specified offenses "committed within the respective jurisdiction of the United States of America or the Kingdom of the Netherlands, *exclusive of the colonies thereof.*" Manifestly the italicised phrase refers only to the Netherlands, and the contention that the laws of its colonies were the laws of that country would not arise under that treaty. In the case of Greene and Gaynor, decided by the Canadian court adversely to this Government and now pending for determination of the proper proceedings for review, there is no doubt that the Canadian laws were invoked and applied by the court under the treaty as part of the laws of Great Britain.

II.

BAIL.

It must always be borne in mind in considering the so-called inherent elements of the authority to take bail that it is not a question of absolute *right* in a defendant, but of *power* and discretion in the courts. On this subject as well as other branches of extradition, State laws and analogies drawn from them must be excluded. The United States law permitting or directing bail to be taken, refers and is limited to crimes and offenses against the United States. That restriction is plainly expressed, and *Rice* v. *Ames* so holds respecting a different point—"the section [1014] is confined to crimes or offenses against the United States" Since sections 1014 and 1015 were originally in the same section of the law (sec. 33, judiciary act of 1789; 1 Stat., 73, 91), the words "*all arrests in criminal cases*" in section 1015 necessarily relate back to the words "any crime or offense *against the United States*" in section 1014.

Not only is there no affirmative authority, then, for taking bail in extradition, but section 5270 directs commitment to jail, "there to remain," etc., when the evidence is deemed sufficient to sustain the charge. It will not do to say that the greater power includes the less, that a magistrate who may finally discharge may enlarge on bail pending proceedings.

And in this connection, it may be suggested that a committing magistrate has the power, after a full and final hearing, to absolutely discharge one accused in a

capital case, though manifestly such magistrate would not have the power, under the laws of this country, to enlarge a person accused of such crime, on bail preliminary to such hearing.

In the particular and peculiar subject of extradition a magistrate must look forward to possible surrender, and must guard his custody so that the contract may be performed. That does not mean to assume guilt. It is the natural penalty of accused persons who place themselves in such relation to two governments whose good faith toward each other is paramount over individual inconvenience. If bail were taken and the accused returned to a State where his offense was not a crime, would the enforcement of return not be at least difficult and doubtful? Would this Government or the demanding government take the bail bond and pursue him? In case of failure to locate and retake, would the enforcement of the bond in the courts and the collection of its amount meet the international demand and proprieties? It is matter of common knowledge that recently a high official of a Western city, under indictment and held to bail, resisted return in two States where he had fled, and was finally retaken after proceedings in interstate rendition proceedings. There the State claiming him could show that he had violated her laws; in the extradition case the State of original arrest could show no such thing.

In answer to the suggestion that the sureties might retake the accused should he escape into another State, we respectfully submit that the law does not repose in

them any such power. The bondsmen of a party enlarged on bail manifestly would have no greater power over the person of their principal in a foreign jurisdiction than a sheriff would have over the person of a prisoner arrested under a warrant and escaping into another State. In both cases interstate rendition proceedings must obviously be resorted to.

In *Gorsline's case* (21 How. Prac. Rep., p. 85) there was a warrant of arrest in process of execution to take an offender from one county to the county in which he had been indicted. It was held that "no justice of the Supreme Court, or other magistrate or officer out of that county, has authority, in my opinion, to take him from custody." There is a distinction between the two cases, of course, since in extradition there is intermediate inquiry and the original warrant may not lead to the final executive warrant to surrender to the rightful jurisdiction; but the theory and principle are the same. Hence the following quotation from the Gorsline case is apposite:

> It is urged, however, that under the habeas corpus act (3 R. S., 5th ed., p. 883, sec. 58) this prisoner should now be let to bail. That section provides for a case *where the party has been committed.* Gorsline has not yet been committed, but is held under arrest by virtue of process, which requires that he be taken to Fulton County, where he may be committed, let to bail, or discharged, according to law.

Referring again to the case of Gaynor and Greene, they were not admitted to bail. The fact that the custody of the sheriff ordered by the court was construed

after a liberal, not to say lax fashion, makes no difference whatever.

I submit with respect that on both propositions the views and conclusions of the circuit court should be sustained.

HENRY M. HOYT,
Solicitor-General.

MILTON D. PURDY,
Assistant Attorney-General.

Supreme Court of the United States.

No. 661.—October Term, 1902.

Whitaker Wright, Appellant,
vs.
William Henkel, United States Marshal for the Southern District of New York, et al.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[June 1, 1903.]

Whitaker Wright applied to the Circuit Court of the United States for the Southern District of New York for writs of *habeas corpus* and certiorari on March 20, 1903, by a petition which alleged:

(1.) That he was a citizen of the United States restrained of his liberty by the Marshal of the United States for the Southern District of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States Commissioner for the Southern District of New York, and commissioner duly authorized by the District Court of the United States for the Southern District of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the District Court of the United States for the Southern District of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery of certain offenders,' approved August 12, 1848, and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation,

which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain."

(2.) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offense herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any proceedings under the complaint and warrant on the ground that the commissioner

had no jurisdiction, but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and in support of the application filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7.) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the Eighth Amendment of the Constitution, and section 1015 of the Revised Statutes, and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted and after hearing dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. —— Fed. Rep. ——. The case was then brought to this court by appeal.

At the argument it was made to appear that on March 31 His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant, issued by one of His Majesty's justices of the peace, for the city of London, for the apprehension of the said Whitaker Wright, for the offense herein first enumerated, and a certified copy of the information and complaint of the Senior Official Receiver in Companies Liquidation (acting under the order of the High Court of

Justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams, on which information and complaint and depositions, the said warrant was granted for the apprehension of the said Whitaker Wright," &c. Copies of these papers accompanied the complaint, and reference was made to cable messages from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint of March 16, and consented to the discharge of the prisoner from the arrest thereon. The commissioner held that as the proceedings under the previous warrant had been carried into the Circuit Court, he was without power to discharge the prisoner under that warrant. Subsequently the order of the Circuit Court dismissing the writs of *habeas corpus* and certiorari and remanding the prisoner was brought to the commissioner's attention, but counsel for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that pending such proceedings he must decline to dismiss the complaint and discharge the prisoner.

Article X of the treaty of 1842, 8 Stat. 572, 576, reads as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided* That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; And the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

Article I of the treaty of 1889, 26 Stat. 1508, is:

"The provisions of the said tenth article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the Companies' Act of 1862, 25 and 26 Vict. c. 89, provides:

"If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of section 611 of the New York Penal Code read as follows:

"SEC. 514. *Other causes of forgery in the third degree.* A person who either (1) being an officer or in the employment of a corporation, association, partnership or individuals, falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association or partnership or individuals; . . . is guilty of forgery in the third degree."

"SEC. 611. *Misconduct of officers and employes of corporations.* A director, officer, agent or employe of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By section 15 it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in the penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870, (33 and 34 Vict. c. 52,) it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of *habeas corpus.*" If he is not surrendered and conveyed out of the United Kingdom "within two months of such committal, or if a writ of *habeas corpus* is issued, after the decision of the court after the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminister," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public

officer of any company made criminal by any act for the time being in force."

By section 5273 of the Revised Statutes, Title LXVI, Extradition, it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any State, on notice, unless sufficient cause is shown to the contrary.

Section 5270 is as follows:

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Mr. Chief Justice FULLER delivered the opinion of the Court:

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, *Ornelas* v. *Ruiz*, 161 U. S. 502; *Terlinden* v. *Ames*, 184 U. S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offense within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offense was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin* v. *Shine*, 187 U. S. 181; *Tucker* v. *Alexandroff*, 183 U. S. 424.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offense charged in this case the treaty of 1889 embodies that principle in terms. The offense must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429, and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute.

As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common law

crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon*, 127 U. S. 457.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases as they occur necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French mission: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore on Extradition, § 344; *United States* v. *Warr*, 28 Fed. Cas. 411.

So Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That in every treaty of extradition the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offenses defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure as well with respect to the definition of crimes, as to the mode of procedure against criminals, and the manner and extent of punishment." Moore on Extradition, § 337*n*.

In *Muller's case*, 5 Phila. 289, 292, the definition of the offense in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the Government of the United States. . . . No legislation of their Government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definition of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offense here charged, can have been expected,

As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed as it was by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin* v. *Shine* we applied the definition of embezzlement given by the laws of California, but there the petitioner himself appealed to the definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress.

It is true that in the case of *Windsor*, 6 B. & S. 522, (1865,) a contrary view was expressed, but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offense of forgery in the third degree could not properly be regarded as extending the force of the treaty to offenses not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offenses made such only by the legislation of particular States of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the Circuit Court erred in denying the application to be let to bail.

By section 1015 of the Revised Statutes it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offenses against the United States. *Rice* v. *Ames*, 180 U. S. 377. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. p. 91, c. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 provides that when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the District Court of Colorado in the case of *Carrier*, 57 Fed. Rep. 578, and Hallett, J. held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had on several occasions been made to the Circuit Court, and that they had been uniformly denied.

In *Queen* v. *Spillsbury*, 2 Q. B. Div. (1898) 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act, and the distinction, existing ordinarily, between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the

power to admit to bail existed, held that as matter of judicial discretion it ought not to be exercised in that case.

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

Order affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.